TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 701

CURTIS REID, SUPERINTENDENT OF THE DISTRICT OF COLUMBIA JAIL, APPELLANT,

vs.

CLARICE B. COVERT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

FILED FEBRUARY 17, 1956

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In the United States District Court for the District of Columbia

UNITED STATES OF AMERICA ON THE RELATION OF CLARICE B. COVERT

v.

CURTIS REID, SUPERINTENDENT OF THE DISTRICT OF COLUMBIA JAIL

Habeas Corpus No. 87-55

PETITION FOR WRIT OF HABEAS CORPUS—Filed November 17, 1955

The petition of the relator Clarice B. Covert, above-named, respectfully alleges and shows to the Court as follows:

1. Relator is a citizen of the United States and a resident of the State of Georgia, and is now in custody of the said respondent Curtis Reid, the Superintendent of the District of Columbia Jail, within the territorial limits of the District of Columbia, and is by him unlawfully imprisoned and restrained of her liberty by color of the authority of the United States Air Force, and such custody, imprisonment and restraint is in violation of relator's rights under the Constitution of the United States, all as more particularly hereinafter recited.

2. In March 1953, relator was living in Upper Heyford, Oxfordshire, England, with her two children and her husband, Edward E. Covert. The said Edward E. Covert was then a Master Sergeant in the United States Air Force, assigned to the 3918th Installations Squadron of the 3918th Air Base Group, and relator and their two children had been furnished Government transportation to England as his dependents, and were living with him in England in quarters furnished by the Government.

2 3. On March 10, 1953, relator was under psychiatric treatment by a medical officer of the United States Air Force. On the night of March 10/11, 1953, while legally irresponsible and suffering from a psychotic disturbance variously diagnosed as psychotic depressive reaction and as paranoid schizophrenia, relator killed her husband, the said Edward E. Covert, after which she climbed into bed with his corpse and stayed there all night.

4. Thereafter, purporting to act under the authority of Article 2(11) of the Uniform Code of Military Justice (50 U. S. C. § 552(11)), the Commander of the 7th Air Division, United States Air Force, caused relator to be tried by a general court-martial of the United States Air Force convened at RAF Station Brize Norton,

Oxfordshire, England, on a charge of premeditated murder in violation of Article 118(1) of the Uniform Code of Military Justice (50 U. S. C. § 712(1)).

5. Relator was so tried on May 25 to 29, 1953, and on May 29, 1953, was convicted of premeditated murder and sentenced to life imprisonment.

6. On June 23, 1953, relator was flown, in the custody of the United States Air Force, to the Federal Reformatory for Women situated at Alderson, West Virginia, and was there confined as a prisoner by virtue of said conviction, beginning June 25, 1953. On December 7, 1953, while still a prisoner at Alderson, a third child was born to relator.

7. Thereafter, on June 24, 1955, in a decision reported at 6 USCMA 48 and 19 CMR 174, the United States Court of Military Appeals reversed relator's conviction, and remanded her case for rehearing, i. e., a new trial, or other action not inconsistent with its opinion.

3 8. On July 14, 1955, relator was released from the Federal Reformatory for Women at Alderson, West Virginia, and was taken, in the custody of the United States Air Force, to the District of Columbia Jail, and there restrained by the respondent Reid.

9. On July 20, 1955, the then Secretary of the Air Force, Harold E. Talbott, personally determined that relator should again be tried by court-martial.

10. On July 25, 1955, relator was taken to St. Elizabeths Hospital for psychiatric evaluation, and was there held as a prisoner. She was found to be sane and not a menace to society, and on September 23, 1955, was returned to the District of Columbia Jail, within the territorial limits of the District of Columbia, where she still remains, under restraint imposed by the respondent Reid by color of the authority of the United States Air Force.

11. The charge against relator referred to in paragraph 4 above has been again referred for trial to a general court-martial of the United States Aif Force appointed by the Commander, Headquarters Command, United States Air Force, who however directed that the case be treated as not capital. Said trial has been tentatively scheduled to take place at Bolling Air Force Base in the District of Columbia commencing on November 28, 1955.

12. The said custody, imprisonment and restraint of relator, and her impending trial by court-martial within the geographical limits of the United States are severally illegal and in violation of Article III, Section 2 of, and the Sixth Amendment to, the Constitution of the United States, as follows:

a. If it be assumed that Article 2 (11), Uniform Code of Military Justice (50 U. S. C. § 552(11)), *supra*, ever validly conferred juris-

diction on the United States Air Force to try relator as a
4 person "accompanying the armed force without the continental limits of the United States," then such jurisdiction terminated after relator's conviction was set aside, and she was held within the continental limits of the United States, not in the custody of the armed forces, but in three separate civilian institutions, viz., the Federal Reformatory for Women, the District of Columbia Jail, and St. Elizabeth's Hospital, which are, respectively, under the supervision, jurisdiction, and control of the United States Department of Justice, the Government of the District of Columbia, and the United States Department of Health, Education and Welfare.

b. In view of the recent ruling of the Supreme Court of the United States in *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11, decided November 7, 1955, there is no valid basis for contending that any military jurisdiction that once existed can now be reasserted.

c. More fundamentally, however, Article 2(11), Uniform Code of Military Justice (50 U. S. C. § 552(11)), which purports to subject to military jurisdiction in time of peace the dependent wife of an airman who has herself no functional relationship with or to the armed forces, is unconstitutional because it violates both Article III, Section 2 of, and the Sixth Amendment to, the Constitution of the United States, which severally guarantee to relator, a civilian, the right of a trial by jury, and because the power conferred on Congress by Section 8 of Article I of the Constitution to "make Rules for the Government and Regulation of the land and naval forces" does not confer power to make rules for the government and regulation of wives of members of the land and naval forces, and does not confer power upon Congress to subject civilians to trial by court-martial in time of peace.

5 13. Granting the writ now prayed for will not mean that relator will go unpunished. She has now been confined for over two and a half years, since March 11, 1953, during all of which time she has been separated from her two older children; and she has been separated from her youngest child, born December 7, 1953, since March 8, 1954, when he was taken from her. Relator further avers, on information and belief, that the associates of Toth, who now completely escapes punishment, served much shorter sentences than this relator. Second Lieutenant Schreiber, who gave the order to kill the Korean there involved, and whose case is reported at 5°USCMA 602 and 18 CMR 226, was released after twenty months' confinement; while Airman First Class Kinder, who pulled the trigger, and whose case is reported at 14 CMR 742, was released after serving only fifteen months and moreover received an honorable discharge. Further, as the cited decisions

show, neither Schreiber nor Kinder were at the time of their offense suffering from mental derangement, disease, or defect of any kind.

WHEREFORE your relator prays that a writ of habeas corpus be granted and issued, directed to Curtis Reid, Superintendent of the District of Columbia Jail, commanding him to produce the body of the relator before this Court at a time and place therein to be specified, then and there to receive and do what this Court shall order concerning the detention and restraint of relator, and that relator be ordered discharged from the detention and imprisonment aforesaid.

CLARICE B. COVERT,
Relator.

FREDERICK BERNAYS WIENER,
Suite 815 Stoneleigh Court,
1025 Connecticut Avenue, N.W.,
Washington 6, D. C.,
(DIstrict 7-2163),
Attorney for the Relator.

6 *Duly sworn to by Clarice B. Covert. Jurat omitted in printing.*

7 [File endorsement omitted]

In the United States District Court for the District of Columbia

Habeas Corpus No. 87-55

UNITED STATES OF AMERICA ON THE RELATION OF CLARICE B. COVERT

v.

CURTIS REID, SUPERINTENDENT OF THE DISTRICT OF COLUMBIA JAIL

Habeas Corpus No. 87-55

ORDER DIRECTING RESPONDENT TO SHOW CAUSE—November 17, 1955

Upon consideration of the verified petition of CLARICE B. COVERT for a writ of habeas corpus filed herein, and good cause appearing therefor, it is, this 17th day of November, 1955,

ORDERED, That the respondent be and he is hereby ordered and directed to appear before the Judge of said Court sitting in Motions Court on the 22nd day of November, at 10 o'clock A. M. of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued and the relief granted as prayed for in

the aforesaid petition; *provided*, that a copy of this rule and of said petition be promptly served upon the respondent herein.

EDWARD A. TAMM,
United States District Judge.

8 [File endorsement omitted]

United States District Court for the District of Columbia

[Title omitted]

RETURN AND ANSWER—Filed November 22, 1955

Now comes the respondent, Curtis Reid, Superintendent of the District of Columbia jail, upon whom has been served an order to show cause why a writ of habeas corpus should not issue for the production of Clarice B. Covert and by his attorney, Leo A. Rover, United States Attorney in and for the District of Columbia, makes the following return to the said order and respectively shows that he holds the said Clarice B. Covert by authority of the United States as a person subject to military jurisdiction and amenable to trial by court-martial under the following circumstances:

I

That on March 31, 1953, an officer of the United States Air Force signed court-martial charges under oath charging the said Clarice B. Covert with the premeditated murder of Master Sergeant Edward E. Covert, on or about March 10, 1953, in violation of Article 118 of the Uniform Code of Military Justice (50 U.S.C. 712). That on or about March 31, 1953, the said Clarice B. Covert was residing on Royal Air Force Station, Upper Heyford, Oxfordshire, England, as a person accompanying the armed forces of the United States without the continental limits of the United States
9 and the territories thereof.

II

Tha the charge against Clarice B. Covert was tried by general court-martial on May 25-29, 1953. That Clarice B. Covert was duly found guilty of the charge and of the specification of the charge and was sentenced to be confined at hard labor for life. That the record of trial was duly reviewed by the Staff Judge Advocate of Headquarters, Seventh Air Division, APO 125, in accordance with Article 61 of the Uniform Code of Military Justice (50 U.S.C. 648). That the officer exercising general court-martial jurisdiction over Clarice B. Covert approved the sentence adjudged and promulgated a court-martial order showing such approval

under paragraph 90, Manual for Courts-Martial, United States, 1951 (16 F.R. 1348). An authenticated copy of General Court-Martial Order No. 14, Headquarters, Seventh Air Division, APO 125, c/o Postmaster, New York, New York, dated June 22, 1953, is appended hereto (Exhibit A).

III

That the record of trial in the case of Clarice B. Covert was forwarded to The Judge Advocate General of the United States Air Force in accordance with Article 65 of the Uniform Code of Military Justice (50 U.S.C. 652) for review by a Board of Review. That qualified military counsel were appointed to represent Clarice B. Covert in all appellate matters involved in her case in accordance with Article 70 of the Uniform Code of Military Justice (50 U.S.C. 657). That Clarice B. Covert also retained civilian
10 counsel to represent her in appellate matters involved in her case. That on September 28, 1953, the civilian counsel retained by Clarice B. Covert filed an assignment of errors before the Board of Review, one of which assigned errors was an allegation that the court-martial improperly found Clarice B. Covert sane as, according to the civilian counsel, the record of trial clearly indicated that Clarice B. Covert was insane and not legally responsible when the act was committed. An authenticated copy of the Assignment of Errors which was filed on behalf of Clarice B. Covert is appended hereto (Exhibit B).

IV

The Board of Review in the Office of The Judge Advocate General, United States Air Force, considered all the errors assigned by military and civilian counsel on behalf of Clarice B. Covert and decided that no error was committed in the conduct of her trial which materially prejudiced her rights, and that the findings of guilty and the sentence were correct in law and in fact. That the Board specifically found competent evidence in the record of trial indicating that prior to the entry of Clarice B. Covert into the area (England) it was necessary to first obtain permission for such entry from the Commanding General, Third Air Force; that pertinent regulations of the Third Air Force prescribed the procedure covering application for permission for dependents of service personnel to enter the United Kingdom and for travel thereto; that Clarice B. Covert's husband, Master Sergeant Edward E.
Covert, pursuant to applicable regulations filed application
11 for transportation of Clarice B. Covert and his dependent children to England; that said application was duly processed in accordance with pertinent regulations and in accordance therewith Clarice B. Covert and her minor children were, as de-

pendents of Master Sergeant Edward E. Covert, the deceased, included upon a priority list for shipment from the United States to the United Kingdom; that pursuant thereto appropriate orders were issued by Headquarters, Third Army, Fort McPherson, Georgia, authorizing Clarice B. Covert's travel, together with her minor children, from the United States to England at Government expense; and that in accordance with the above authorization Clarice B. Covert travelled to England via military service transport; that Government facilities at the point of embarkation and disembarkation were utilized and that Clarice B. Covert travelled in company with other civilian dependents of other military personnel assigned to duty in England; that upon arrival at Royal Air Force Station, Upper Heyford, England, Master Sergeant Edward E. Covert, the husband of Clarice B. Covert, was assigned public quarters and Clarice B. Covert was issued appropriate authorization for Commissary and Post Exchange facilities; and that on at least three occasions subsequent to 15 February 1953, Clarice B. Covert received medical treatment at United States Air Force medical facilities at Upper Heyford, England. An authenticated copy of the decision of the Board of Review is appended hereto (Exhibit C).

V

That Clarice B. Covert was duly advised of the decision of the Board of Review on May 21, 1954, and was duly notified on
12 that date of her right to petition the United States Court of Military Appeals for a grant of review. That Clarice B. Covert filed a Petition for a Grant of Review with the United States Court of Military Appeals alleging that the Board of Review had erred in holding that the evidence was sufficient to support a finding that the accused was legally responsible when the act was committed. An authenticated copy of the petition filed on behalf of Clarice B. Covert with the United States Court of Military Appeals is appended hereto (Exhibit D).

VI

That in accordance with Article 67(b)(2) of the Uniform Code of Military Justice (50 U.S.C. 654 (b)(2)) The Judge Advocate General of the Air Force certified to the Court of Military Appeals questions concerning the instructions given by the law officer at the trial of Clarice B. Covert. An authenticated copy of the Certificate for Review filed by The Judge Advocate General of the Air Force is appended hereto (Exhibit E).

VII

That the Court of Military Appeals considered the Certificate of Review filed by The Judge Advocate General of the Air Force,

together with the errors assigned on behalf of Clarice B. Covert, and determined that a rehearing was required to avoid the danger of a miscarriage of justice. That the Court remanded the record of trial to The Judge Advocate General, United States Air Force, and ordered "that such proceedings be had in said case as will cause the convening authority to order a rehearing, if such rehearing is practicable". An authenticated copy of the decision and order of the Court of Military Appeals is appended hereto (Exhibit F).

13

VIII

That pursuant to the decision of the Court of Military Appeals, The Judge Advocate General, United States Air Force, transmitted a copy of that decision on July 11, 1955, together with the record of trial by court-martial of Clarice B. Covert, to the Commander, Headquarters Command, Bolling Air Force Base, Washington, with instructions "to take action in accordance with the decision of the United States Court of Military Appeals, and to order a rehearing if such rehearing is practicable". That Clarice B. Covert could have been returned to England for the rehearing of her case but it was determined to be both feasible and appropriate to have the proceedings in her case conducted by the Commander, Headquarters Command, Bolling Air Force Base, Washington, District of Columbia. A copy of the letter from The Judge Advocate General is appended hereto (Exhibit G).

IX

That on July 12, 1955 the Commander, Headquarters Command, ordered a rehearing of the case of Clarice B. Covert. An authenticated copy of General Court-Martial Order No. 17, Headquarters Command, United States Air Force, Bolling Air Force Base, dated July 12, 1955, announcing the results of appellate review in the case of Clarice M. Covert and ordering a rehearing of that case is appended hereto (Exhibit H). That the rehearing of this case has been tentatively scheduled at Bolling Air Force Base, Washington, D. C., for November 28, 1955.

14

X

That Clarice B. Covert was thereafter transferred from the Federal Reformatory for Women, Alderson, West Virginia, to Washington, D. C., and, there being no suitable custodial facilities for women at any military installation in the Washington area, the Director, Department of Corrections, District of Columbia, was requested to confine Clarice B. Covert in the District of Columbia jail pending her retrial by court-martial at Bolling Air

Force Base. An authenticated copy of the letter, dated July 13, 1955, from the Commander, Headquarters Command, to the Director, Department of Corrections, is appended hereto (Exhibit I).

XI

That pursuant to such request, Clarice B. Covert was confined to the District of Columbia jail on July 14, 1955 by the respondent. An authenticated copy of the receipt signed on behalf of the respondent indicating the confinement of Clarice B. Covert on July 14, 1955, is appended hereto (Exhibit J).

XII

That on July 15, 1955, the civilian counsel of Clarice B. Covert requested that she be examined as to her present mental condition and that for this purpose she be transferred for observation and examination to a suitable medical installation. An authenticated copy of the letter received by the Commander, Headquarters Command, from civilian counsel for Clarice B. Covert is appended hereto (Exhibit K).

15

XIII

That pursuant to this request, the Superintendent, St. Elizabeth's Hospital, was requested by The Judge Advocate General, United States Air Force, on July 21, 1955, to admit Clarice B. Covert to that hospital for a period of ninety days or such additional period of time as might be necessary "for psychiatric observation and diagnosis". That this request was approved by the Superintendent of St. Elizabeths Hospital on July 25, 1955, and Clarice B. Covert was thereafter transferred to that hospital for psychiatric observation and diagnosis. Authenticated copies of the correspondence relating thereto are appended hereto (Exhibit L).

XIV

That jurisdiction once lawfully attached is not lost by a subsequent change in status of a person subject to trial by court-martial under the Uniform Code of Military Justice.

XV

That this case is not controlled by the decision of the Supreme Court of the United States in the case of United States ex rel. Audrey M. Toth v. Donald A. Quarles, Secretary of the Air Force, as a rehearing is merely a continuation of the original proceeding, and does not involve an attempt to initiate court-martial proceedings after the return of Clarice B. Covert to the United States.

XVI

That an unbroken line of federal cases holds that it is within the constitutional power of Congress to provide for the trial by court-martial of persons accompanying the armed forces of the United States outside the continental limits of the United States, its territories and possessions.

16

XVII

That the issue of whether Congress may constitutionally provide that persons "accompanying the armed forces without the continental limits of the United States" shall be subject to trial by court-martial under the Uniform Code of Military Justice was duly raised by counsel for Clarice B. Covert at her trial by general court-martial and was determined adversely to her. That the Board of Review specifically considered the question of whether jurisdiction did in fact exist in the court-martial convened for the trial of Clarice B. Covert and determined that such jurisdiction did exist. That these determinations by the military tribunals must be accorded due consideration on this petition for a writ of habeas corpus.

XVIII

That competent evidence at the trial by court-martial established that the American Commander at Royal Air Force Station, Upper Heyford, England, executed a certificate which was delivered to an authorized representative of the United Kingdom stating that Clarice B. Covert was, on March 10, 1953, a person subject to the military laws of the United States and that, accordingly, no further action was taken in respect to Clarice B. Covert by representatives of the United Kingdom. That such certificate was executed by the Commander of Royal Air Force Station, Upper Heyford, England, in accordance with the Visiting Forces Act of 1942 which provides that *exclusive* jurisdiction over members of the United States armed forces rests in the armed forces of the United States, that any

17 person subject to military or naval law of the United States shall be deemed to be a member of the armed forces for the purposes of the Act, and that a certificate by an appropriate American authority that a person named and described in such certificate is or was at the time subject to military or naval laws of the United States shall be conclusive evidence of that fact. That the Visiting Forces Act of 1942 and the agreement of the United Kingdom to the exercise by United States military courts of exclusive jurisdiction in respect of offenses by members of the armed forces of the United States was based upon the assumption that the United States military authorities and the courts concerned would be able and willing to try and, on conviction, to punish all criminal offenses

which members of the United States armed forces may be alleged on sufficient evidence to have committed in the United Kingdom.

XIX

That the issue of sanity was given full and fair consideration by the military authorities during the trial and appellate review of the case of Clarice B. Covert and that issue may not be relitigated at this time in the Federal courts. *Burns v. Wilson*, 346 U.S. 137; *Whelchel v. McDonald*, 340 U.S. 122.

XX

Respondent denies each and every allegation contained in the petition for writ of habeas corpus except as hereinbefore specifically admitted, modified or explained.

18-39 XXI

Whereas, the respondent respectfully prays this Court that the order to show cause be discharged and petition for a writ of habeas corpus be dismissed.

LEO A. ROVER,
United States Attorney.
OLIVER GASCH,
Principal Assistant United States Attorney.
ALFRED BURKA,
Assistant United States Attorney.

JOSEPH J. F. CLARK,
Major, USAF,
Office of The Judge Advocate General,
United States Air Force,
Of Counsel.

40 EXHIBIT "C" TO RETURN AND ANSWER

Department of the Air Force
Office of the Judge Advocate General
Washington, D. C.

In the Board of Review, United States Air Force

Before BERG, Chairman, PISCIOTTA and ALLENSWORTH, Members
Judge Advocates

19 February 1954

AFCJA-23/5 ACM 7031

UNITED STATES

v.

CLARICE B. COVERT, a person accompanying the Armed Forces of the United States without the continental limits of United States and the possessions thereof.

SEVENTH AIR DIVISION

Sentence adjudged 29 May 1953 by G.C.M. convened at Royal Air Force Station Brize Norton, Oxfordshire, England, APO 125. Approved sentence: Life imprisonment.

Appearances: Frederick Bernays Wiener, Esquire, Colonel Kenneth B. Chase and Major John J. Ensley, appellate counsel for the accused; Lt. Colonel Harold Anderson and Major William G. Carrow, III, appellate counsel for the United States.

DECISION—February 19, 1954

The Board of Review has reviewed the record of trial by general court-martial in the above-entitled case.

Upon trial, the accused pleaded not guilty to, but was found guilty of premeditated murder of her husband, Master Sergeant Edward E. Covert, in violation of Article 118, Uniform Code of Military Justice (Charge and specification). She was sentenced to life imprisonment. No evidence of previous convictions was considered.

The convening authority approved the sentence, designated
41 the Federal Reformatory for Women, Alderson, West Virginia, as the place of confinement pending completion of appellate review, and forwarded the record of trial to The Judge Advocate General, United States Air Force, for review by a Board of Review.

The facts and circumstances surrounding the unfortunate event

which gave rise to this prosecution and conviction may be summarized as follows:

At approximately 2:00 p.m., on 14 March 1953, the accused appeared at the Air Force Dispensary, Royal Air Force Station, Upper Heyford, England, pursuant to an appointment made the previous day. Her appointment was with Captain Ivan C. F. Heisler (USAF), a psychiatrist assigned to the 5th Hospital Group on duty at the dispensary at that station. In response to his first inquiry as to how the accused felt, accused stated "I killed Eddie last night" (R. 66). Accused further related that she had hit the victim with an axe and that at the time he was in bed, asleep and snoring. She "thought" she had killed the victim about eleven o'clock the night before, and she was "sure" he was dead (R. 66, 67). At the time Captain Heisler had no reason to suspect that the accused had committed a crime, and he thereupon proceeded to question accused momentarily to ascertain, in his own mind, whether what had been disclosed to him had actually happened. After several minutes he left the room and located Major (then Capt.) Holloway, base surgeon, and apprised him of the fact that he thought that an accident had occurred at the home of accused, and suggested that they investigate at the quarters of accused and the reported victim. Accused was left in the care of a nurse at the dispensary, and Captain Heisler, Major Holloway, and an Air Police Officer of the station proceeded to the home of the Coverts. On arrival at the quarters, the trio gained entrance by use of a key previously handed to Doctor Heisler by Mrs. Covert. On entering they immediately proceeded upstairs to the bedrooms. In one of two bedrooms they discovered two cots, only one of which appeared to have been slept in. On this particular cot was piled numerous blankets, with a bedspread over the top, and it appeared as though the bed had been hastily made up. On drawing back the covers of this particular cot there became visible on the bed the body of the deceased. A pillow covered the head, and there was in evidence a "good deal" of blood on the sheets and the lowermost
42 blankets (R. 68). The body of the deceased was in a reclining position, on its back with the head somewhat to the left, with both hands resting in a sleeping position, over the chest. It was "quite obvious", without detailed examination, that the person was dead (R. 68). The party immediately departed from the premises.

Twenty minutes later Captain Heisler, in company with an agent of the Office of Special Investigations, returned to the scene. Without making a detailed examination, Captain Heisler observed several wounds on the body, primarily a large hematoma on the left side of the neck, which appeared to be a post mortem collection of blood, and also a few, "about" five, small triangular cuts on the

right side of the face, mostly on the cheek (R. 68, 69). Prosecution Exhibits 12, 13 and 14 accurately portray the scene of the cot with the body thereon as seen by Captain Heisler on 11 March 1953 (R. 69-71).

The body was removed to the infirmary where a thorough examination was conducted. On examination, Major Holloway found evidence of a blow behind the right ear over the mastoid process and a small break of the skin at that point. There was evidence of bleeding from the right eardrum, and in addition there were multiple contusions, abrasions, and a few lacerations over the right side of the face. Major Holloway concluded, based on his examination, that there were fractured facial bones. In the opinion of this doctor, the cause of death was a fracture at the base of the skull, immediately below the tip of the ear, which may have been caused by the use of a blunt instrument.

During investigation at the premises of the accused and the deceased, a hand axe was discovered in a coal bucket near the fireplace in the front room, on the first floor of the quarters. Stains thereon were believed to be blood stains. Prosecution Exhibit 8, a hand axe, discovered by Mr. Servatka of the Office of Special Investigations, in the home of the principals, was received in evidence (R. 84). On 17 March this agent removed a pair of pajamas from a laundry tub in the home of the Coverts. It was apparent that this garment had not been washed, and it appeared to be in the same condition at the time of trial as when discovered (Pros. Ex. 10; R. 85, 86). By stipulated testimony of Professor James M. Webster of the West Midland Forensic Science Laboratory, Birmingham, England, it was established that the stains appearing on the hand axe (Pros. Ex. 8) were human blood and that the stains on the pajamas (Pros. Ex. 10) were likewise human blood (Pros. Ex. 11, R. 63).

43

An autopsy was performed on the body of deceased on 12 March 1953 by Doctor Raymond Winston Evans, pathologist at the United Liverpool Hospital and the University of Liverpool, England. This autopsy revealed multiple injuries to the face, particularly on the right side, of an incisional character, especially in the quadrilateral formed by the tip of the nose and the upper lip. There was a hematoma on the right side of the skull and, under this, a depressed fracture with the fractured fragment of the skull depressed into the cranial cavity. Examination of the open skull revealed injury to the brain, and it was the conclusion of this witness that death had been due to injury and hemorrhage of the brain, resulting from the depressed fracture of the skull, together with the multiple injuries of the right side of the head. Further examination of the body proper revealed no evidence of disease. The stomach disclosed the presence of some blood, probably due to

swallowing of blood by the deceased following fracture of the skull. The abdominal organs appeared otherwise healthy, as were also the heart and lungs. There was no evidence of injuries affecting the torso or the extremities. Examination of the blood for alcohol, morphia and opiates proved negative. The opening in the skull was approximately two inches by one and one-half inch in diameter and "were most likely due to a blunt instrument" and could have been caused by use of Prosecution Exhibit 8 [hand axe] (R. 94-96).

On 16 March 1953 accused was interviewed at the United States Air Force Hospital, Burderop Park (England), by Major Furst, an agent of the Office of Special Investigations in the presence of Lieutenant Colonel Martin, chief psychiatrist of that hospital and Special Agent Servatka, previously referred to. Accused was advised by the investigator of the provisions of Article 31 of the Uniform Code of Military Justice and of the offense of which she was suspected (R. 73). On inquiry accused acknowledged that she understood the explanation of the provisions of Article 31 of the Code, stating in effect "Then I don't have to say anything", to which the three officers identified above replied in the affirmative (R. 74).

Accused then related the following facts and events:

44 On the evening of March 10 accused's husband arrived home at the usual time. Accused had been visiting a neighbor, a Mrs. Scamordella. There had been no argument. The deceased had retired at the usual time, attired in a two-piece pajama suit. When asked about incidents surrounding the offense, accused appeared vague, being certain only that "He was asleep, and I was ready for bed". On being queried as to whether she had used an axe, accused replied in the affirmative, but she was unable to recall how many times she had used it. She further stated that she did not know why she committed the act but that "No one else did it but me. I plead guilty". During the years since their marriage, her husband had drunk to excess; that he gambled, and that this had frequently led to financial difficulties. Once he became heavily involved with the American Express Company as a result of gambling at Ruislip (England). Previously, in 1948, he had suffered similar difficulties at Williams Field in the United States. He had forged checks as a result of gambling, and it had become necessary for accused to cash certain insurance policies in order to raise funds to redeem the forged checks. An unfortunate transaction involving the sale of an automobile by her husband had operated to their financial detriment. Her husband had no sense of financial responsibility. All he thought of was wine, whiskey and having cars, and as a result they could never get ahead. While stationed at Upper Heyford, the deceased usually came home late in the evening. He ignored the children, and he gave no thought to their future. Concerning a legacy which she had inherited from an aunt, deceased had frequently stated that he intended to buy a new

car and tour Europe. In the past deceased had struck the accused. While in the United States, she had once filed for a divorce but that the parties became reconciled before finality of the proceedings. Following receipt of information of the legacy in January of 1953, accused became restless and couldn't sleep. She worried about her father returning to claim a share of her inheritance, and she was greatly disturbed over her husband's views about spending the money. On one occasion at the non-commissioned officers' club at Royal Air Force Station, Upper Heyford, the deceased had become intoxicated and had insulted accused, who had gone to the club in search of her husband. Accused was particularly distressed as her husband had promised that she and a neighbor friend could go to Oxford that day, but as a result of deceased's intoxication and failure to return home, their departure was delayed, and accused became very upset. On the night of March 10, she had been dressed in flannel pajamas, and after the incident, she had placed these in a dirty-clothes tub.

At approximately 1:30 or 2 o'clock in the afternoon of March 11, 1953, accused was seen by a neighbor, coming across the green, proceeding toward the nursery. She had taken her two children to the nursery, and she returned alone (R. 79-80). Mrs. Covert arrived at the nursery with her two children at approximately half past 1 o'clock in the afternoon of March 11. She appeared very pale and on inquiry as to her health, stated that she felt "all right". As she departed she seemed to stagger, and she had difficulty in locating the knob of the door (R. 163, 164). Shortly after 2 o'clock in the afternoon of the same day, one Airman Goodwin went to the Covert quarters to discuss some work projects with deceased. His knock on the door failed to bring a response, however, he did see Mrs. Covert inside the house, through the window. Accused then appeared at the door and, in response to Goodwin's question, advised the latter that the deceased was not in. At the time Mrs. Covert was fully dressed and appeared to be "grouchy" (R. 80-83). When Agent Servatka of the Office of Special Investigations found Prosecution Exhibit 8, the hand axe, it was resting in a coal pail near the fireplace in the living room of the Covert home. Prosecution Exhibit 10, the pajamas, were removed on 17 March from a laundry tub in the same home. There was no evidence to indicate that these garments had been washed, and the stains appearing thereon were then, as at time of trial, visible (R. 83-86).

At approximately 5:30 o'clock in the evening of March 10, deceased called for his wife at the home of a neighbor, Mrs. Scamordella. Deceased appeared to be in good health. After a visit of approximately a half hour, the Coverts left (R. 53-54). The social acquaintanceship of this witness and the Coverts extended back to the month of January. Mrs. Covert had previously discussed with

her the former's concern over deceased's drinking habits, and once expressed the opinion that unless deceased was able to correct his habits in this regard, something "might happen". On one occasion she mentioned returning to the United States because of the distasteful conduct of her husband and because of the illness of her children. In response to a question as to how she felt, Mrs. Covert stated that she felt "pretty good". She did not appear upset
46 or nervous. Mrs. Scamordella considered the Coverts an average, contented family, and there was never any fighting or squabbling. Mrs. Covert had declined her husband's suggestion that she go to a bingo game on the evening of March 10 with the witness, preferring to remain at home rather than go without him. When they departed, their relations appeared perfectly harmonious. During the period January to March, Mrs. Covert had frequently complained of her inability to sleep, her concern over the health of her children, and her own ailments (R. 86-93).

On one occasion in February 1953, accused was to accompany a friend, a Mrs. Anton, on a shopping trip to Oxford. Deceased, who was to attend the children, failed to return home as he had promised. This necessitated going to the noncommissioner officers' club in search of him. Deceased had been drinking considerably, and accused complained of having been insulted and abused by him at the club. She was extremely nervous and upset, and she related to the witness previous experiences of having been struck and abused at the hands of her husband. Once they separated, and accused applied for a divorce. However, four months later the parties rejoined one another, and the divorce proceedings were halted. Deceased's drinking and gambling habits and general irresponsibility frequently resulted in loss of friends. Referring to a legacy from a deceased aunt, accused stated that if she shared in the estate she would leave her husband—she was going to "kiss him goodbye". Several days after the Oxford shopping trip, Mrs. Covert informed the witness that when she returned from Oxford she found deceased drunk and "passed out", the children had over-run the house, scribbled on the walls, and the premises were in general disarray (R. 96-99, 102). Mrs. Covert first commenced complaining about her inability to sleep, nausea, other illnesses, and concern for her children in January and February 1953 (R. 100-102).

The foregoing narrative statement is a résumé of the evidence introduced by the prosecution as to the essential facts upon which the alleged offense is predicated. The following statement is a summary of evidence introduced by the defense in behalf of the accused, including evidence concerning the question of sanity of the accused. As sanity of the accused is one of the principal issues in this case, additional evidence pertinent thereto introduced by

the defense and the prosecution will be related during con-
47 sideration of the assignment of errors filed by appellate defense counsel, in a subsequent portion of this opinion.

Accused as a witness in her own behalf testified that she was born at Augusta, Georgia, on December 21, 1920, following the second marriage of her mother. Her childhood was an unhappy one, marked by frequent disagreements between her parents. Accused was once told by her mother that her father had attempted to throw accused out a window, and on one occasion he had attempted to choke accused. In the year 1926, accused's father left the family. However, he later returned, but in 1932 he "deserted us for good". Accused's recollection of her father is one of cold indifference on the part of the latter, her father did not love the accused because she was not a boy. Accused's father demonstrated his dislike by bringing her gifts and toys designed for boys such as drums, footballs, fishing rods and tool chests. Her father was plagued with financial difficulties, occasioned by gambling, and he was never long able to retain steady employment. Accused felt unwanted, alone and afraid, she never enjoyed parental love. She never felt free to invite her friends to her home because she was ashamed of the place in which they lived, which she described as a dirty, broken down three-bedroom house, next to a chicken yard and an alley. During her high school years accused was reticent because she felt she was "different" from other students, and she purposely avoided coming in contact with others.

Following completion of high school, accused entered nurses' training, having left her home because she felt she was not wanted. She met her husband (deceased) on a blind date at Camp Blanding, Florida, in January, 1943. In the month of March of that year they were married. Deceased was then a second lieutenant in the Infantry. In May of 1943 deceased went overseas to Africa and Italy, and returned in November, 1945. While overseas, deceased encountered numerous financial difficulties, and on one occasion, accused was compelled to send her husband six hundred and twenty-nine dollars or he would be "thrown in the stockade". In November of 1945, deceased was released from the service. He was not interested in college or settling down. Most of his time was spent in drinking and in spending five thousand dollars which accused had managed to save during the war. In March, 1946, deceased re-
entered the service (Air Force) as a master sergeant. During
48 his tour of duty at Williams Air Force Base (Arizona), deceased again became engrossed financially, once involving a matter of a two hundred and fifty dollar check drawn on a bank in which he had no account, and again during accused's first pregnancy, deceased suffered a four hundred and fifty dollar gambling loss, resulting in an overdrawal of their joint bank accounts

Accused's first child was born on November 11, 1947. At that time their savings had been entirely depleted, and it was necessary to convert an insurance policy to cover the expenses incident thereto. The second child was born on September 20, 1950. While stationed in Arizona, the parties purchased a farm, necessitating expenditure of all of their savings and which resulted in a complete financial loss.

In February of 1948, accused, as a result of her husband's financial difficulties and losses, moved with her infant son and mother to Phoenix, Arizona, where accused obtained employment. After a few months she returned to her husband because "I couldn't stay away from him. I was a nervous wreck the whole time I was away from him. I couldn't eat; I couldn't sleep; I couldn't even hardly hold my job down". After returning to her husband she suffered no difficulties such as she had experienced during the separation.

In May, 1951, deceased was assigned to duty in England with the Seventh Air Division. In September of that year accused joined her husband, residing temporarily in London. Shortly after her arrival in England, the parties learned that their household goods, which had been left behind, had been destroyed by fire. This caused accused considerable worry. In addition, she was concerned with the health of the youngest son, particularly the fact that he had never showed any inclination to speak, although he had reached the usual age for this development. Deceased drank less than usual but continued to gamble. In July of 1952 deceased was transferred to Upper Heyford, and accused was most desirous of joining him at that station.

In December of 1952 accused was informed that she was about to inherit a sum of money, but the actual amount was unknown. Immediately her husband (deceased) indicated his desire to purchase a new automobile, and he planned and discussed a European trip. Accused on the other hand "didn't want to touch the money". She wanted to place it in trust for the education of the children, for a home, and for retirement. Although this diversity of opinion was not a source of friction or disagreement, it cause accused considerable worry. Following news of the inheritance, accused suffered a feeling of "dying", "passing out", and not being able to "go on". She sought aid at the infirmary but was told that in the absence of a fever no emergency existed, and she returned home. The expected inheritance had not caused accused to consider separation from her husband, although she had once asked him to "put in the papers". She felt she could not leave him, she had "tried it before, and it just didn't work".

Shortly after her visit to the infirmary accused obtained an appointment with Doctor Cogar, and on being examined by the latter for blood pressure, heart condition, etc., she was informed that she

needed sedation. Her complaint was an inability to eat or sleep. She was given a bottle of phenobarbital and advised to return later for further examination. The medicine proved ineffective, however, and accused's condition became progressively worse. Further examination led to information that accused suffered toxic goiter, with a recommendation for hospitalization for a period of four to six weeks. Accused thereupon entered Burderop Park Hospital where she underwent further clinical tests. These tests disclosed no organic difficulties, and accused was discharged, having been supplied with a quantity of sleeping tablets. On the night of 7 March, accused took four of the blue tablets (which she received at the hospital). Her testiinony relative thereto is as follows: "I don't know why I took them. I didn't know whether they'd kill me or whether—or what would happen, but I just took them" (R. 122). She awakened at approximately 11 o'clock the next day, March 8. During the day, accused was beset with morbid thoughts, crystalizing on events in bygone years. Her desperation finally drove her to leave the dinner table and go to the dispensary. There she conferred with Major Westbrook, who arranged an appointment for accused for the next day with Doctor Cogar.

On March 9, Mrs. Covert, pursuant to the appointment made the previous day, visited Doctor Cogar. Accused informed the doctor that she desired hospitalization, that "there was something wrong with me; that I had to go that night; that if he didn't take me, I was just going to explode" (R. 123). Apparently unable to effect hospitalization of accused, Doctor Cogar prescribed certain "red" tablets, similar to those he had prescribed on prior occasions for accused. That evening she took two of these tablets. During the night of March 10, accused consumed the remainder of her supply of blue and red tablets, all "that I could find". Since March 11, accused had been hospitalized, and during this period she was informed of her pregnancy (R. 113-124).

Accused further testified on cross-examination that her recollection of taking the pills in the evening of March 10 was vague, but she believed it must have been around midnight. She was unaware of the possible effect of the pills, nor did she recall why she had taken them, except that her condition was such that she did not care whether she lived or died. Recounting events of her childhood, accused related that she was born prematurely, and that as an infant she had not been expected to live; her parents had selected a coffin for her burial; and she was plagued with the thoughts of her father's cruelty towards accused and her mother. Accused reiterated her inability to remember how many pills she had taken, but she definitely remembered having taken all of the red and blue pills she had on that date (R. 124-132).

Defense evidence, other than the testimony of the accused, was offered and received. From July 1952 to March 10, 1953, Master

Sergeant Covert had been assigned to an Air Installations Squadron. Although he at first appeared efficient, it soon became apparent that he lacked the capabilities of an airman of that grade and as a result, it was necessary to frequently reassign him. His judgment was poor and of a "childish" nature. He gambled regularly, at least once or twice a month, and he was financially irresponsible. Bad checks were frequent which deceased paid only after repeated insistence of his superiors (R. 133-152; Def. Exs. B, C, D; R. 165-168). In the opinion of neighbors, accused and her husband appeared to get along well, and there were no public demonstrations such as quarrels or disputes indicating other than that they were an amiable couple (R. 153). Mrs. Covert's principal worry seemed to be her concern for the health of her children (R. 172-179).

By stipulation, Mrs. May Barksdale, accused's mother, testified that accused's father was a squanderer; that he delighted in tormenting accused with his cruel behavior; that he had never
51 loved his daughter because she was not a boy; and that accused was the constant target of his mean, sadistic disposition (Def. Ex. F, R. 170). Further stipulated testimony established that accused had inherited an estate of the approximate value of forty thousand dollars, which matter had become final and conclusive at the time of trial (Def. Ex. G, R. 171).

On 3 March 1953, accused had received fifteen capsules of sodium amytal, each of three grains, pursuant to prescription, at the pharmacy of the 5th Hospital Group, Burderop Park, England (Def. Ex. H, R. 172).

Captain Cogar, an Army Medical Doctor, treated accused at Upper Heyford Base Infirmary on 16 and 19 February and 9 March 1953. On 16 February, he prescribed mild sedation for the patient because she showed a state of nervous anxiety, and he advised her to return in three days. On 19 February, her condition had not improved. However, a complete medical evaluation disclosed no organic illness. On 9 March, Mrs. Covert appeared even more upset and emotionally disturbed. She stated that she felt as though "something were about to let go", and that if something was not done to relieve her condition she feared something serious might happen. Although Captain Cogar believed that she was extremely emotionally upset, he did not consider that she suffered from any mental disease. However, he decided that psychiatric treatment should follow. He thereupon made an appointment with Captain Heisler, a psychiatrist at the 5th Hospital Group. Prior to dismissal, accused was given seven capsules of seconal of one and one-half grains each, similar to six such tablets furnished her on 19 February, the prescribed dosage being one capsule each night, to be followed by a second capsule if sleep was not induced (Def. Ex. I, R. 234). On 10 March, Captain Heisler interviewed accused for approximately one and one-half hours. At the time she showed

symptoms of severe anxiety and agitation, requiring psychiatric attention. She recounted a history of illness extending over the preceding three months, of lack of interest in normal activities, difficulty in sleeping despite medication, and a constant, vague feeling of uneasiness and anxiety, commencing with receipt of information of her prospective legacy. She related her childhood difficulties with her father, his resentment and cruelty. Hospitalization during the period 25 February to 3 March had uncovered no physical ailments, but instead of alleviating her symptoms, they became progressively worse. In the opinion of the doctor, there was no need for
52 immediate hospitalization. An appointment was arranged for the next day, and accused departed (R. 181-186). Earlier, while testifying for the prosecution, this witness had stated that he graduated from Stanford School of Medicine in 1947; that he interned at San Francisco County Hospital; and that he had served a one-year residency there; his professional experience further included one year of internal medicine with the United States Army in Europe, and he has been engaged in active professional duties in the field of psychiatry continuously since entering the Air Force in 1951.

The next day, 11 March, accused appeared at the hospital pursuant to her appointment. She was dressed in slacks and a leather jacket, her hair was uncombed, and she looked disheveled and obviously distressed. Then followed the conversation set forth in a preceding portion of this opinion, wherein accused acknowledged having killed her husband the night before, adding "I guess I hated him like I hated my father" (R. 186-187). Accused remained at the infirmary during the greater part of the afternoon. She appeared completely detached and showed no emotion or concern for the increased activity surrounding her (R. 222). Considering her condition at that time, together with the information gained the preceding day, Doctor Heisler found evidence of a psychotic disturbance; that accused had "gone into a psychotic depressive reaction". Subsequent information led to the conclusion that accused was in a very profound depressive state at the time of her visit on 11 March and not mentally responsible for her acts (R. 188, 189, 214). Since 11 March this officer has spent approximately forty hours interviewing accused, most of which occurred subsequent to 28 March. These interviews involved probing into accused's early childhood, her difficulties, and her life in general up to that time. Events in her married life parallelel those of her youth, her husband drank, squandered money, stayed away from home, and failed to bestow parental love on the children. All of these events gave rise to a feeling of failure on the part of accused. During adolescence accused, as a result of her ungainly height and over-sensitivity incident to wearing glasses at an early age, suffered additional distress. Normal developments of a child of her age were character-

ized by her parents as portending dire consequences. She made few attachments and lacked security. Following marriage,
53 her whole life was devoted to raising her children, in whom she took refuge, rather than meeting the challenges of ordinary normal family life. Because of deceased's conduct and attitude she assumed the major responsibility for the family. Deceased's actions towards the children had caused the oldest son to develop marked resentment and hostility towards his father, further adding to the distress of accused (R. 190-194). A combination of all of the preceding factors developed within accused a strong feeling of ambivalence, an unresolved conflict of love and hate for a given person or object. When a person, as a result of unresolved conflicts becomes so disturbed that external realities are grossly misinterpreted, and resort is had to irrational solutions of a problem facing the patient, a psychosis exists. Psychosis is likewise indicated where the patient, as a result of severe depression and reoccupation, is unable to take reassurance in the ordinary manner of doctor-patient relationship, and when this condition is coupled with amnesia, psychosis does exist (R. 195-206). In the opinion of Doctor Heisler, accused on the night of 10 March suffered a mental defect which he characterized as a psychotic depressive reaction, which rendered her incapable of knowing that an act of premeditated murder was wrong. Her mental condition completely deprived her of the power of choice or volition, and as a consequence, she was unable to adhere to the right. No resistance, short of physical restraint, would have deterred her, and a policeman standing at her side, without more, would have probably not even have been noticed, much less provided the restraint necessary to overcome her impulses (R. 207-208).

On cross-examination, Captain Heisler testified that accused was definitely not psychotic when she left his office on 10 March, basing his opinion on that single interview. However, on the night of 10 March accused was a psychotic depressive, and emotionally insane, even though she was capable of carrying out certain volitional acts. In arriving at this conclusion, the witness placed considerable weight on the fact that accused had attempted suicide in the face of her love for the children. This, taken together with the fact she admitted having spent the night in bed with her husband after he was dead, established that she was totally devoid of any appreciable sense of reality, and, therefore, psychotic. The psychotic episode on the night of 10 March was of brief duration, and at the time of trial accused was perfectly sane, although suffering a moderately severe neurotic personality problem (R. 208-217). The attempted
54 concealment of the body with blankets and pillows by accused to prevent the children from discovering the corpse was a natural act and one which could easily have been comprehended by a psychotic (R. 218-219). In the doctor's opinion, a suicidal

tendency which accused harbored at the time of her visit to his office on March 10 changed to a homicidal tendency sometime between her departure and commission of the act, which is a common characteristic of a psychotic depressive reaction (R. 224-225).

Subsequent interviews revealed that prior to March 10 accused had previously contemplated suicide, having once formulated a plan of dashing herself in front of a bus. At one time, she had taken four barbiturate tablets for the express purpose of killing herself. After March 10 she was kept under a "suicide watch" in the psychiatric ward (R. 228). A person of accused's size and weight consuming twelve grains of sodium amytal would ordinarily sleep eighteen to twenty hours, and this would be considered a normal dose for sedation of violent persons. Eighteen grains of sodium amytal might constitute, but not necessarily, a fatal dose (R. 198). Based on the facts learned during numerous interviews, this witness was of the opinion that the act was one of psychotic depression, despite the fact that the sanity board had diagnosed accused's condition as "disassociative reaction" (R. 203).

Further evidence adduced by the defense in rebuttal as to the issue of sanity will be set forth infra, following a summarization of evidence introduced by the prosecution on this issue.

Following introduction into evidence of the testimony summarized above, the prosecution responded with the testimony of three expert witnesses. Captain James H. Graves, assistant chief of psychiatry at the 5th Hospital Group testified that he was a graduate of Northwestern University School of Medicine. Following graduation he served as a research fellow, Institute of Neurology, Northwestern University, for a period of two years, leading to a Master of Science degree. Prior to his present duty assignment, he served for a period of two years as chief of psychiatry, Keesler Air Force Base Hospital (Biloxi, Miss.). He is familiar with the provisions of paragraph 121 of the Manual for Courts-Martial and the provisions of Air Force Manual 160-42, Psychiatry in Military Law, and feels bound by those publications.

55 As a member of a sanity board, consisting of the witness and two other psychiatrists, Captain Graves had occasion to examine and evalute the accused's mental condition. In his opinion, the accused was at the time of the commission of the alleged offense, able to distinguish right from wrong, and to adhere to the right. Likewise, at time of trial accused was able to understand the charges against her, and to cooperate in her own defense. There has been no substantial change in his opinion concerning accused's mental responsibility. Accused did not act under an irresistible impulse as defined in Air Force Manual 160-42, and if a policeman, or someone else were present, accused would not have committed the act. From his clinical examinations, Captain Graves concluded that accused's thinking processes were not dis-

turbed, that is, her intellectual capacity and moral senses were within normal limits. There was no evidence to indicate that accused could not adhere to the right. On the contrary, evidence as to this factor was more negative than positive (R. 242-244).

Captain Graves first saw accused on her entry into the hospital on or about 13 March, and his first interview with accused was on the fourteenth. Three or four more interviews followed prior to the board proceedings on 23 March. Following drafting of an original report of the proceedings, the entire report was re-written by all of the members, including the witness, Colonel Martin and Captain Troy. The board considered a "write-up" previously prepared by Captain Heisler, and also the accused's past history and behavior, as well as her present behavior, in detail. At the time of the board proceedings, no formal charges had been presented for the board's consideraiton, and any information as to the nature of the offense was that contained in Captain Heisler's report previously referred to. Examinations revealed a lifelong history of neurosis, and after the incident, a clear-cut picture of a "severe psychoneurosis—a severe neurosis". However, there was no evidence of a marked thinking disturbance or of an abnormal emotional condition, and although depressed, the accused had not been unusually abnormal (R. 245-251). This is characterized in psychiatry as a dissociative reaction which means that, for a temporary period of time, the patient's personality does not function as a whole. Certain forces are set temporarily aside, and others come forth, and for a period, control the actions of the patient; a more or less temporary
56 "brushing aside" of the victim's conscience. This, however, is not psychosis and does not involve mental disintegration or deterioration. In the opinion of the witness, there was a partial weakening of power to adhere to the right and to know right from wrong and to act accordingly. Accused, however, still possessed the mental capacity to adhere to the right and to know the difference between right and wrong, and her "disassociation" would not have produced the crime for which accused was now on trial (R. 252). This is not considered a true psychotic state, and it is only rarely that a disassociative reaction develops into complete abrogation of the patient's conscience. Had such a condition occurred, there would have been subsequent evidence thereof upon which such a diagnosis could be founded. Captain Graves found no such evidence. In the opinion of the witness, accused was capable of knowing the act was wrong, but he was further of the opinion that she had not planned the act in that she considered the "pros and cons" or the consequences, and he did not believe that "this thing is premeditated". Evidence of suicide attempts might, but does not necessarily bear a close relationship to the victim's sanity. Under existing regulations and manuals and the legal tests of sanity as set forth therein, the witness could only conclude that the accused

suffered a neurotic reaction (R. 253-257). Under these authorities, impairment of the ability to distinguish right from wrong, or adhere to the right, has no effect on criminal responsibility, and according to the standards laid down in Air Force Manual 160-42, the accused was, on 10 March, mentally responsible in a criminal sense (R. 258-264).

Another witness on behalf of the prosecution was Lieutenant Colonel Richard L. Martin, chief of professional services, 5th Hospital Group, and consultant to the Surgeon, United States Air Forces, Europe. Colonel Martin graduated from the Ohio University Medical School in 1943 and completed internship in the U. S. Military Hospital in 1944. He is a graduate of the Military School of Neuropsychiatry (May 1945), and since that time, his primary duty has been in the field of psychiatry, including three years residency training in neuropsychiatry at Walter Reed General Hospital. His present assignment commenced in January 1951 (R. 266).

Colonel Martin served as a member of the sanity board that considered accused's case. Based on his observations and findings, and as a result of his individual examinations of the patient, this witness was of the opinion that at the time of the commission of the
57 offense, the accused was able to distinguish right from wrong and—with certain qualifications—was able to adhere to the right. However, there was some impairment of her ability to adhere to the right (R. 267).

In cross-examination, defense counsel elicited that the witness had observed accused for varying periods of time between 11 and 23 March, including six to eight hours of actual interview. Based on his examinations, interviews, and consultations with other members of his staff, and with particular consideration to the facts found by Captain Heisler, Colonel Martin concluded that the severity of accused's illness impaired her ability to adhere to the right, even though she was not psychotic at the time of the offense. This was a dissociative reaction which was of such degree accused performed an act not within her normal behavior pattern. In his opinion, the mental mechanisms which controlled accused's normal behavior had been so severely impaired functionally that she had no regard for right or wrong—that it did not make any difference to her (R. 273). While a psychotic state may be classified as a dissociative reaction, it does not follow that the converse is true. The latter may not be sufficiently severe to constitute a psychotic state. Colonel Martin's opinion was the same at time of trial as at the time of preparation of the sanity report. "There is [was] no evidence of premeditation or of prior consideration of the act * * * the deduction * * * was hastily arrived at and impulsively carried out, without prior consideration or planning" (R. 274). However, accused was capable of forming the necessary degree of intent to bring the act about. The act was not the result

of an irresistible impulse, based on the standards prescribed in Air Force Manual 160-42. Although the witness has not changed his opinion as to accused's sanity since his original findings, more convincing evidence has come to his attention since that time, which indicates even more serious impairment than originally determined, but his conclusions as to accused's mental responsibility remain unaltered (R. 275-276). According to medical tests, accused is pregnant (R. 277).

The final witness for the prosecution on this issue was Major Richard E. Troy, assistant chief of neuropsychiatric service at Burderop Park Hospital (England). This officer graduated from the University of Colorado School of Medicine in 1947, interned at Salt Lake City County Hospital in 1947 and 1948, and later
58 served a three year residency in psychiatry at the Colorad Hospital in Denver. Since that time his duties in the Air Force have been exclusively in psychiatry. He was recently certified by the American Board of Neurology and Psychiatry as a member in psychiatry. He is the only psychiatrist at Burderop Park Hospital having been accorded this recognition (R. 277).

Major Troy was likewise a member of the sanity board that considered accused's case. Based on his observations and examinations of accused, he was of the opinion that the accused suffered no mental defects; disease or derangement which would affect her ability to distinguish right from wrong, nor her ability to adhere to the right, with respect to the offense for which she was on trial. In his opinion, accused did not act, on 10 March, as a result of an irresisfible impulse as defined in the military manuals, and further, that accused would not have committed the act had there been a policeman at her side (R. 278).

On cross-examination of Major Troy, defense counsel brought out that the witness had spent approximately three to three and one-half hours with accused, although he had interviewed accused prior to the alleged offense. In the opinion of this witness, accused was on the night of the alleged offense mentally responsible, although her ability to adhere to the right may have been impaired. This conclusion was based on accused's history of ambivalence, resulting in a "dazed, inipaired perhaps" state of mind. When he examined the patient after the offense, her feelings fitted into a pattern wherein all of her thoughts towards her father re-mobilized and she saw her husband, whom she described as irresponsible, a drinker, etc., in the same light as she remembered her father. She saw in her husband a potential obstacle to all of the things she wanted to do for her children with the legacy. On the night of the offense "* * * this extreme tension and mixed-up feeling[s], depression, * * * sort of came to a head, almost overwhelmingly, to the point that she, * * * operated almost in an automatic or dazed manner." Further, the ambivalence, mixed feelings and de-

pression, her desire to give her children something, thoughts of her futile and ruined life, a feeling of nothing to gain, and many other factors all contributed to any impairment accused suffered at the time (R. 280). However, accused did possess sufficient capacity to form an intent and was capable of premeditation; common to the nature of the offense charged (R. 285).

59 The court took judicial notice of Air Force Manual 160-42, Psychiatry in Military Law (R. 285).

In rebuttal, the defense called as a witness Captain N. R. Edelsohn,* clinical psychologist at the 5th Hospital Group, Burderop Park. This officer detailed his qualifications as including sixteen to seventeen years' experience in applied fields of psychology of which six or seven years were devoted to clinical psychology. Approximately thirty-six hours after the fatal act, he commenced administering a series of psychological tests to accused, including the following standard tests: the Wechsler-Bellevue, the Bender-Gastalt, the HTP, the Mackover, the TAT, the Cornell Index, the Minnesota Multiphasic, and the Rohrschach. Based on the results of these mental tests at the time given, this witness was of the opinion that the accused on 10 March was of extremely limited mental responsibility, and his clinical diagnosis of her condition was paraschizophrenia. This is considered a psychotic state (R. 288, 190). The presence of a policeman at the side of accused at the time of the fatal act would not have "resisted" accused any more than would the presence of the United States Army "in toto." In the opinion of Captain Edelsohn the findings of the sanity board were ridiculous (R. 290-292). He had submitted the results of his tests to Colonel Martin within a day or two after completion (R. 290). [Presumably prior to the board proceedings.]

Captain Heisler, recalled as a witness for the defense, reaffirmed his conclusions that on March 10 accused was in a true psychotic state, despite the testimony of Colonel Martin, Major Troy, and Captain Graves to the contrary (R. 293). A psychotic episode of short duration would not necessarily leave evidence of residuals (R. 295). On being further recalled as a court witness Captain Heisler testified that, in his opinion, accused would not be a menace or danger to society (R. 313).

In her request for appellate counsel, accused has urged that the proceedings are fatally defective for the reason that the law officer of the general court-martial, Captain Charles W. Denham, had been relieved, it is contended, from active duty prior to trial. Were this true the court-martial would have been improperly constituted, and we would have no difficulty in holding that the court-martial pro-

* The affidavit is made by Capt. Adelsohn, however, the record refers to him as *Edelsohn*.

ceedings are in law fatally defective. However, we do not find such to be the case. Our conclusion in this regard is based on
60 examination of the official records and files of the Department of the Air Force concerning this officer, of which we are authorized, and do, take judicial notice (MCM, 1951, par. 147; ACM S-7080, Murphy, — CMR — [8 Oct. 53]; ACM 6630, Williams, 9 CMR 845; ACM S-5552, Robinson, 9 CMR 685; ACM 5197, Dorce and Hicks, 5 CMR 766; ACM S-2019, Lamar, 2 CMR 731).

The official records on file in this headquarters establish that Captain Denham was on 3 March 1953 relieved from his unit assignment, and from extended active duty, effective that date, pursuant to the provisions of section 515, Public Law 381, 80th Congress, for the purpose of accepting voluntary extended duty, in an indefinite status (SO 47, Hq, 3909th Air Base Gp, APO 179, par 9, dated 3 Mar. 53). On 4 March 1953 this officer was ordered to extended active duty in accordance with the provisions of Public Law 381, referred to above (SO 48, Hq, 3909th Air Base Gp, APO 179, par. 10, dated 4 Mar. 53). Simultaneously therewith Captain Denham executed the prescribed oath of office as a captain, United States Air Force, together with an agreement to remain on active duty for an indefinite period, not to exceed twenty-one months. He was finally relieved from active duty on resignation of his commission, effective 10 September 1953 (SO 211, Hq, Scott AFB and 3310th Technical Trng. Wg., Scott AFB, Ill, par. 10, dated 4 Sep. 53). As trial in the instant case was held on 25-29 May 1953, it appears quite obvious that there can be no question as to the military status of the law officer at the time of trial.

Appellate counsel for the accused has, by written assignment of errors, challenged the sufficiency of the evidence to sustain the findings of guilt and the sentence. Likewise, numerous errors have been assigned on the record which appellant contends require reversal of the conviction. These will be considered in a subsequent portion of our opinion. Though not urged as error before the Board of Review, defense counsel at trial level attacked the jurisdiction of the court to try accused by a motion to dismiss, because "* * * a private citizen of the United States * * * is being tried for a capital crime, in violation of the Fifth and Sixth Amendments of the Constitution of the United States." (R. 13). In support of the foregoing motion, the defense offered for consideration of the law officer Appellate Exhibit 2 (R. 13), which is a stipulation
61 between trial and defense counsel and joined in by the accused to the effect that during the period of 11 March 1953 to the time of trial the accused had been a patient in the psychiatric ward of the 5th General Hospital, Burderop, England, and that until 15 April 1953, accused was kept in a padded

cell, behind locked doors, with an Air Police guard posted outside the door at all times. Defense counsel argued that the Fifth Amendment of the Constitution had been violated because there had been no presentment or indictment of the accused by a grand jury. He further contended that, in the absence of a showing that the accused was a member of the military service, trial before a military tribunal amounted to a denial of liberty and perhaps life, without due process of law. Violation of the Sixth Amendment to the Constitution was predicated upon an unsuccessful attempt of the accused, prior to trial, to have appointed as members of the court-martial at least one warrant officer, airmen and noncommissioned officers, and additionally, dependent wives of officers, airmen or noncommissioned officers (App. Ex. 1, R. 13).

In order to establish jurisdiction over a civilian under the provisions of the Uniform Code of Military Justice (Art. 2[11]), it must be shown that such civilian was serving with; employed by; or accompanying the armed forces outside the continental limits of the United States, and beyond certain geographical limits specifically set forth in the cited article (U.S. v. Weiman and Czertok [No. 1403], 3 USCMA 216, 11 CMR 216; U.S. v. Schultz [No. 394], 1 USCMA 512, 4 CMR 104; CM 360857, Smith, 10 CMR 350; ACM 6341, Biagini, et al., 10 CMR 682; ACM 7255, Herrero, — CMR — [30 Oct. 53]). In each case the test is an objective one (McCune v. Kilpatrick, 53 F. Supp. 80). The pertinent provisions of Article 2 of the Code provide:

"The following persons are subject to this code:

* * * * * *

"(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and without the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands;"

62 The wife of a member of the armed forces of the United States who accompanies her husband to, or joins him at his duty station in a foreign country, is a person "accompanying" the armed forces of the United States within the meaning of the quoted portion of Article 2 of the Code (Madsen v. Kinsella, Warden, 343 U.S. 341, 72 S. Ct. 699, 96 L. ed. 988; CM 360857, Smith, *supra*). Evidence introduced by the prosecution in support of its claim of jurisdiction to try the accused establishes the following competent facts of record: Prior to entry of the accused into the area (Eng-

land), it was necessary to first obtain permission for such entry from the Commanding General, Third Air Force (R. 21); pertinent regulations of the command concerned (3rd AF Reg. 34-18) prescribed the proceedings governing application for permission for dependents of service personnel to enter the United Kingdom, and for travel incident thereto (R. 19); that accused's husband, Master Sergeant Edward E. Covert, pursuant to the above-referenced authority, filed application for transportation of the accused and his dependent children to England (Pros. Ex. 7; R. 15, 16); that said application was duly processed in accordance with pertinent regulations, and in accordance therewith, the accused and her minor children were, as dependents of deceased, included upon a priority list for shipment from the United States to the United Kingdom (Pros. Ex. 2; R. 20, 21); that pursuant thereto, appropriate orders were issued by Headquarters, Third Army, Fort McPherson, Georgia, authorizing accused's travel, together with her minor children, from the United States to England, at Government expense (Pros. Ex. 3; R. 22, 23); and that in accordance with the above authorization, the accused traveled to England via military surface transport (R. 23); that Government facilities at the point of embarkation and debarkation were utilized, and that the accused traveled in company with other civilian dependents of military personnel assigned to duty in England (R. 23-25). Upon arrival at Royal Air Force Station, Upper Heyford, England, the accused's husband, now deceased, was assigned public quarters (Pros. Ex. 4, 5; R. 26-27), and accused was issued appropriate authorization for commissary and post exchange privileges. Also, she received medical treatment at United States Air Force medical facilities at Upper Heyford, England, on at least three occasions subsequent to 15 February 1955 (R. 28 29).

At the time of the commission of the alleged offense, there was in existence what is commonly termed the Visiting Forces
63 Act of 1942 (5 and 6, Geo. 6, Ch. 31), an agreement between the United States and Great Britain, the pertinent provisions of which provide that exclusive criminal jurisdiction over members of the United States armed forces rests in the armed forces of the United States. This act further provides that all persons who are by the law of the United States of America, at the time, subject to military or naval law of the United States, shall be deemed to be members of said [visiting] forces. Also, the act further provides that in respect to any proceedings in any court of the United Kingdom, a certificate issued by or on behalf of such authority as may be appointed for that purpose by the Government of the United States, stating that a person named and described in such certificate is or was at the time subject to the military or naval laws of the United States, shall be conclusive evidence of that fact (App. Ex. 6,

R. 47). In accordance with the above referred to provisions of the Visiting Forces Act, the Base Commander of Royal Air Force Station, Upper Heyford, England, executed an appropriate certificate which was delivered to an authorized representative of the United Kingdom, setting forth that the accused was on 10 March 1953 a person subject to the military laws of the United States. Thereupon, no further action was taken in respect to the accused by representatives of the United Kingdom (R. 38-43). The Visiting Forces Act, 1952 (15, 16 Geo. 6, 1 Eliz. 2, Ch. 67), was not in effect at the time of the commission of the alleged offense (R. 47). In this connection, see the Agreement Regarding Status of Forces of Parties of The North Atlantic Treaty, and the Resolution of Ratification, United States Senate, 15 July 1953 (AF Bulletin No. 21, 13 Oct. 53). Accordingly, jurisdiction in this case, if it existed at all, was in the United States Government. From what we have said above, there can be no doubt that jurisdiction did in fact exist in the court-martial convened for trial of the accused (McCune v. Kilpatrick, *supra;* Madsen v. Kinsella, *supra;* Perlstein v. United States, 151 F. 2d 167, in re Berue, D.C., 54 F. Supp. 252, Ex parte Jochen 257 F. 200; Hines v. Mikell, 259 F. 28, 39 S. Ct. 495, 250 U.S. 645, 63 L. ed. 1187; Ex parte Falls, 251 F. 415; United States v. Weiman and Czertok, *supra;* CM 360857, Smith, *supra;* ACM 6341, Biagini, et al., *supra;* ACM 7255, Herrero, *supra*).

Defense counsel's contention that the accused was denied due process may be answered by a simple restatement of the often quoted phrase that in the military or naval services of the United
64 States, trial by military tribunal is due process (Reeves v. Ainsworth, 219 U.S. 296, 55 L. ed. 225, 31 S. Ct. 230; Ex parte Reed, 100 U.S. 13, 25 L. ed. 538; Johnson v. Sayre 15 S. Ct. 773, 158 U.S. 109, 39 L. ed. 914; Mullan v. United States, 29 S. Ct. 330, 212 U.S. 516, 53 L. ed. 632; United States Ex Rel Creary v. Weeks, Secretary of War, 42 S. Ct. 509, 259 U.S. 336, 66 L. ed. 973; Burns v. Wilson, — U.S. —, 97 L. ed. (Advance, p. 996). There is no requirement in the Fifth Amendment of the Constitution of the United States that persons tried by a military tribunal be proceeded against by presentment or indictment of a grand jury. In fact, the amendment by specific language excepts those cases arising in the land or naval forces, and in the militia. Hence, it necessarily follows from our determination that the accused was subject to trial by court-martial, that no presentment nor indictment by grand jury, as a preliminary requisite to the validity of the court-martial proceedings, was required.

With reference to accused's request, and the denial thereof, for appointment of warrant officers, enlisted personnel and dependent wives of military personnel as members of the court-martial, we are of the opinion that the convening authority acted properly in

denying such request. Article 25 of the Uniform Code of Military Justice defines eligibility to serve as a member of a court-martial. Under the provisions of that article, any officer on active duty with the armed forces is eligible to serve on all courts-martial for the trial of any person who may lawfully be brought before such court for trial. Any warrant officer on active duty with the armed forces is eligible to serve on general and special courts-martial for the trial of any person other than an officer who may lawfully be brought before the court for trial. Enlisted persons on active duty with the armed forces are eligible to serve on general and special courts-martial for the trial of any enlisted person brought before such court, who is not a member of the same unit as such enlisted accused, provided, however, that the accused has requested that the membership of the court-martial include enlisted personnel. The article further provides that the convening authority shall appoint as members of a court-martial such persons as in his opinion are best qualified for that duty by reason of age, education, training, experience, length of service and judicial temperament.

65 From the above, it appears quite obvious that there is no provision in the Code, nor has any other statutory authority been brought to the attention of the Board of Review, for appointment of civilians as members of a court-martial. Indeed it appears that appointment of a civilian as a member of a court-martial would be improper, and hence the court would not be legally constituted. As the accused in this case was not an enlisted person, there was no authority in law for appointment of an enlisted person as a member of the court-martial. The determination of whether a warrant officer should be appointed as a member of the court-martial rested in the sound discretion of the convening authority (Art 25[*d*][2], UCMJ). The accused is not except in the case of an enlisted person, authorized as a matter of law to indicate his preference in the composition of the court-martial (in this connection see CM 331859, Pierce, 80 BR 199 and cases cited at p. 201; see also ACM 6341, Biagini, et al., *supra*).

Appellate defense counsel's first assigned error challenges the correctness of the court's findings as to the sanity of the accused. The second assigned error attacks the validity of the (court-martial) proceedings on the grounds that expert witnesses were limited in their expression of psychiatric opinion on account of the provisions of Air Force Manual 160-42 (Psychiatry in Military Law). It is the contention of appellant's counsel that this manual was changed in a material respect shortly prior to trial. The disposition of the first two assigned errors requires consideration by the Board of Review of a substantial portion of the evidence introduced at trial, the effect of the service manual referred to and,

additionally, consideration of certain post trial affidavits filed by several of the witnesses who testified on behalf of the prosecution and the defense at trial. For this reason, the Board of Review will consider assignment of errors one and two together.

At the outset we acknowledge that the Board of Review, in considering the question of sanity of the accused, may make an independent determination of that issue, and, in so doing, we may go beyond the bare record of trial in order to obtain and evaluate all available information which will be of aid in resolution of this question (ACM 4200, Lindahl, 2 CMR 825, pet den, 3 CMR 150; U.S. v. Burns [No. 847], 2 USCMA 400, 9 CMR 30; CM 349217, Patrick, 7 CMR 278; CM 353051, Downs [Recon.], 5 CMR 66 295; CM 354045, Puckett, 6 CMR 143; CM 351164, Lyles [Recon.], 6 CMR 440). However, if the issue has been fully explored and property litigated at the trial level, there is no requirement that the Board of Review upset the holdings of the court-martial or launch into an independent investigation (US v. Burns, *supra;* see also ACM 1254, McKinney [BR], 1 CMR [AF] 625).

As pointed out in our preceding statement of the evidence in this case, the testimony of the expert witnesses as to the sanity of the accused is in sharp conflict. Captain Heisler and Captain Edelsohn, the former a psychiatrist and the latter a psychologist, testified that, based on extensive examination and observation of the accused, they determined that she was, at the time of the commission of the alleged offense, incapable of distinguishing right from wrong and, further, that she was incapable of adhering to the right. Both of these witnesses were firm in their opinion that the accused suffered a definite mental psychotic condition, amounting to legal insanity. On the other hand, Lieutenant Colonel Martin, Captain Graves and Major Troy expressed the opinion that, although the accused suffered some degree of mental impairment, she was nevertheless sane, with legal standards. These witnesses diagnosed the accused's mental condition as a dissociative reaction. Thus, we are confronted with a situation where expert witnesses, trained in a highly technical field, in varying degrees, express opinions wholly in disagreement upon a given subject. But is not uncommon for psychiatrists to testify wholly in disagreement upon a given point. Judicial cognizance has been taken of this fact. As was observed by Associate Justice Arnold of the United States Court of Appeals for the District of Columbia in Holloway v. United States, 148 F2d 665, cert den 334 US 852, 92 L ed 1774, 68 S Ct 1507:

> "And so it is that when psychiatrists attempt on the witness stand to reconcile the therapeutic standards of their own art with the moral judgment of the criminal law they become confused. Thus it is common to find groups of distinguished scientists of the mind testifying on both sides and in all di-

rections with positiveness and conviction. This is not because they are unreliable or because those who testify on one side are more skillful or learned than those who testify on the other. It is rather because to the psychiatrist mental 67 cases are a series of imperceptible gradations from the mild psychopath to the extreme psychotic, whereas criminal law allows for no gradations. It requires a final decisive moral judgment of the culpability of the accused. For the purposes of conviction there is no twilight zone between abnormality and insanity. An offender is wholly sane or wholly insane." (See also CM 365415, Burton, —— CMR——.)

From the voluminous evidence of record on the question of sanity of accused at the time of the offense, the court was required to accept or reject such part or all thereof as it saw fit, in its determination of this vital issue. The legal test of sanity as applied in military law is set forth in paragraph 120*b*, Manual for Courts-Martial, United States, 1951, and insofar as here pertinent provides:

> " * * * A person is not mentally responsible in a criminal sense for an offense unless he was, at the time, so far free from mental defect, disease, or derangement as to be able concerning the particular act charged both to distinguish right from wrong and to adhere to the right. The phrase 'mental defect, disease, or derangement' comprehends those irrational states of mind which are the result of deterioration, destruction, malfunction of the mental, as distinguished from the moral faculties. To constitute lack of mental responsibility the impairment must not only be the result of mental defect, disease, or derangement but must also completely deprive the accused of his ability to distinguish right from wrong or to adhere to the right as to the act charged. * * * "

It was incumbent upon the court to apply the standards set forth in the above quoted portion of the manual against the evidence before it, expert and lay. The issue was one purely of fact (ACM 2831, Edelbaum [BR], 3 CMR [AF] 560; ACM 2810, Pelate [BR], 4 CMR [AF] 46; ACM 4115, Ward, 2 CMR 688; ACM 5126, McGee, 4 CMR 810; ACM 6114, Procopio, 10 CMR 845). The court was not, however, and likewise the Board of Review is not, bound to accept the testimony of either expert or lay witnesses, nor the opinion of one or more experts in preference to opinions of others (ACM 3253, Diamond [BR], 4 CMR [AF] 370; ACM 5126, McGee, *supra*; ACM 873, Carras [BR], 2 CMR [AF] 133; ACM 5507, Thomas 6 CMR 792; CM 348185, Hofues, 4 CMR 356; Holloway v. US, *supra*; US v. Harriman, 4 F Supp 186; US v. Hill, 62 F2d 1022).

68 This is not to say, of course, that either a court-martial or the Board of Review should disregard *pro forma* the testimony of any given class or group of witnesses, be they experts possessed of technical professional qualifications, or mere laymen. Having accepted the standard of mental responsibility as defined in the Manual for Courts-Martial, however, we must give due consideration to the ramifications and interpretations of such a standard. In so doing sound reason, justice and fairness dictate that due consideration be accorded advances in medical science, including those in the field of mental competency. The accused's sanity, however, is a question of fact to be resolved by the triers thereof, based on a consideration of all of the evidence, not the least of which is that of lay witnesses whose views upon the subject of accused's sanity, founded upon intimate daily contacts, are not without probative value. The difficulties, and often injustices, resulting from overemphasis, or lack thereof, accorded a given category of evidence have been long recognized by the courts. In Davis v. United States, 160 US 469, 40 L ed 499, 16 S Ct 353, Mr. Justice Harlan in speaking for the court, made the following observations:

> "It seems to us that undue stress is placed in some of the cases upon the fact that * * * the defense of insanity is frequently resorted to and is sustained by the evidence of ingenious experts whose theories are difficult to be met and overcome. Thus, it is said, crimes of the most atrocious character often go unpunished, and the public safety is thereby endangered. But the possibility of such results must always attend any system devised to ascertain and punish crime, and ought not to induce the courts to depart from principles fundamental in criminal law, and the recognition and enforcement of which are demanded by every consideration of humanity and justice. No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them, by whomsoever adduced, is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged."

69 In ACM 873, Carras (BR), *supra*, a Board of Review, after an exhaustive review of numerous decisions involving the question of weight and effect to be accorded psychiatric testimony in criminal prosecutions, stated its views as follows:

> "* * * Although we should always give careful consideration to the opinions of men trained in the field of neuropsychiatry, and accept the view that a person may be suffering from mental disease because of a *functional* disturbance or disorder, as distinguished from an *organic* or *structural* impairment of

the brain itself, we should not supplant the finding of the forum—the court-martial—before which accused received his 'day in court' by the office of the psychiatrist, his report of examination, or his testimony at the trial. It has often been said that 'no man can look into the heart or mind of another' but that the existence of intent, malice, etc., are peculiarly within the province of the triers of the fact, inferable from the surrounding facts in evidence; and it is believed that the existence of mental responsibility may be determined in a like manner by the same forum. And, when we can reach the abiding conviction that the members of the court-martial were able in the case at hand, 'upon their *consciences*, to say that the evidence before them, by whomever adduced, is sufficient to show beyond a reasonable doubt the existence of' mental responsibility, the findings of the court-martial on this issue should not be disturbed on review." (Italics in original)

More recently an Air Force Board of Review in ACM 6114, Procopio, *supra*, wrote on this subject as follows:

"The testimony in the present case clearly placed in issue the sanity of the accused at the time of some of the alleged offenses. With respect to the determination of such an issue, the Board of Review in United States v. McGee (ACM 5126, 4 CMR 810, 818) stated:

'The cardinal question before the Court was whether accused was insane at the time of the commission of the offenses charged. This issue was one of fact (Pelate, supra; ACM 2831, Edelbaum (BR), 3 CMR (AF) 560; ACM 4115, Ward, 2 CMR 688 and cases cited therein). The court was not bound to accept the opinion of one or more of the experts in preference to the opinions of others (ACM 3253, Diamond (BR), 4 CMR (AF) 370); in fact, a court is not bound to accept the opinion of any expert if other evidence is more persuasive and common sense conclusions dictate otherwise (Holloway v. U. S., 148 F. 2d 665; U. S. v. Hill, 62 F2d 1022; U. S. v. Harriman, 4 Fed. Sup. 186).

'The court in this case obviously had no reasonable doubt as to accused's sanity for implicit in the findings of guilty is the determination that the accused was mentally responsible for the acts charged (Pelate, supra; Diamond, supra; ACM 2721, Driggers (BR), 3 CMR (AF) 513):'

"In addition to the authorities above cited, other decisions also hold that neither the court-martial nor the Board of Review is required to accept the opinion testimony of any one of the experts as binding or conclusive on the question of

sanity, but should independently determine the issue of sanity to its satisfaction (ACM 873, Carras (BR), 2 CMR (AF) 133, 161; ACM 4200, Lindahl, supra)."

Another quotation from the opinion in Holloway v. United States, *supra*, appears particularly apropos at this point:

"A complete reconciliation between the medical tests of insanity and the moral tests of criminal responsibility is impossible. The purposes are different; the assumptions behind the two standards are different. For that reason the principal function of a psychiatrist who testifies on the mental state of an abnormal offender is to inform the jury of the character of his mental disease. The psychiatrist's moral judgment reached on the basis of his observations is relevant. But it cannot bind the jury except within broad limits. To command respect criminal law must not offend against the common belief that men who talk rationally are in most cases morally responsible for what they do.

71 "The institution which applies our inherited ideas of moral responsibility to individuals prosecuted for crime is a jury of ordinary men. These men must be told that in order to convict they should have no reasonable doubt of the defendant's sanity. After they have declared by their verdict that they have no such doubt their judgment should not be disturbed on the ground it is contrary to expert psychiatric opinion. Psychiatry offers us no standard for measuring the validity of the jury's moral judgment as to culpability. To justify a reversal circumstances must be such that the verdict shocks the conscience of the court." (See also United States v. Gundelfinger, 102 F Supp 177).

From the above authorities, it appears well settled in military and civil law that testimony of expert witnesses is generally subject to the same qualifications and limitations as the testimony of any other witnesses. Courts may accept or reject it; the testimony of one witness may be given greater weight than that of another; or the testimony of the expert may be wholly disregarded by the court in favor of more persuasive evidence elicited from a lay witness. While the Board of Review may judge the credibility of witnesses and determine controverted questions of fact, we must not lose sight of the fact that the court members saw and heard the witnesses, and had a far better opportunity to form an opinion as to the merits of the evidence than does the Board of Review. We cannot say, on the basis of this record, that the court-martial erred in giving greater weight to the testimony of the expert witness for the prosecution, if in fact this be the case, than was accorded to that of

those who testified on behalf of the accused (US v. Biesak [No. 2676], 3 USCMA 714, 14 CMR 132, 12 Feb. 54; US v. Johnson [No. 2588], 3 USCMA 725, 14 CMR 143, 12 Feb. 54). We might observe that it appears only logical and proper that this did occur. While at least one witness for the defense, Captain Heisler, possessed the qualifications of a psychiatrist, on the opposite side we have the testimony of three psychiatrists, all of whom were at least equally, if not better qualified in this field, by reason of their academic and professional training and experience. Normally, we would accord greater weight to the testimony of the best qualified "expert", all other things being equal (ACM 873, Carras, *supra*).

It should not be overlooked that Captain Edelsohn, while
72 a qualified psychologist, possessed no recognized qualifications in psychiatry, other than his own assertion that a person "cannot operate as a clinical psychologist without knowing the full field of psychiatry" (R. 288).

In our consideration of these assigned errors, we have not greatly stressed the testimony of several lay witnesses who testified before the court-martial. It is significant to note, however, that these witnesses, most of whom were neighbors and friends of accused and the deceased, were unanimous in their opinions that the accused was a calm person, not readily excitable, and one whose only real concern was for her home and children. Not one testified that the accused was in any sense abnormal. Certainly there is nothing in this evidence that is contrary to, or in any manner reflects adversely on the court's findings. On the contrary, this evidence is entirely consistent with a determination that the accused was sane. While there is some evidence that accused possessed suicidal tendencies, and that on at least one occasion sometime before the act, she had attempted suicide, and also immediately thereafter, this evidence was before the court, was vigorously and repeatedly pressed by the defense, and we have no reason to believe that the court-martial did not give proper consideration to this evidence in arriving at its findings (US v Biseak, *supra;* US v Johnson, *supra*).

In further support of these assigned errors, appellate defense counsel contends that the evidence establishes beyond question that accused acted under an irresistible impulse when she slew her husband. Air Force Manuay 160-42, paragraph 5, contains a "very fine discussion" of this subject (see US v Trede [No. 1803], 2 USCMA 581, 10 CMR 79). Paragraphs *5a* and *5b* of the May 1953 edition of this manual are substantially the same as contained in the same publication issued in September, 1950, except that the "policeman at the side" test has been replaced by the "expectations of detection and apprehension" standard insofar as pertinent to the defense of irresistible impulse, in subparagraph *5a* thereof. The changes occurring in the language in paragraph *5c* of the latest

publication have also been attacked by appellate defense counsel and will be subsequently considered by the Board of Review in dealing with that claimed error. The referenced paragraphs of the present manual provide:

73 "a. If the accused knows that the act is wrong, yet cannot 'adhere to the right' because of some mental disorder, he is *not* mentally responsible. This concept recognizes that if a person, because of mental illness, is wholly deprived of the power of choice or volition, he does not possess the freedom of action essential to criminal responsibility. This presents the medical officer squarely with the thesis of irresistible impulse. It should be applied in any given case for cogent reasons only, and with great discretion, since it lends itself readily to abuse. Any accused can say that, when he committed the assault, theft, or murder, something made him do it, and that he could not restrain himself. The medical officer will view such claim with extreme caution, because of its dangerous potentialities. The 'adhere to the right' or 'irresistible impulse' doctrine is not intended to apply to actions committed while drunk, nor to the furies and frenzies of an ill-tempered man who is free of psychosis. Nor should it be used to exculpate aggressive character or behavior disorders. Actually, the doctrine is but seldom applicable, and its application will be limited to actions committed by persons with sick minds—actions perpetrated because of those sick minds. In general, only two kinds of mental illness can be considered to have features which might have application under this doctrine—psychoneurosis and psychosis. A psychoneurosis is a chronic disease; it is a way of life. The medical officer will be properly skeptical of an allegedly irresistible impulse that was, for the first time in the subject's life, suddenly generated just before the commission of the crime. Before testifying that an accused did the act because of an irresistible psychoneurotic compulsion, the medical officer should be satisfied first, that the act is part of a repeated psychoneurotic pattern; second, that the accused exhibited mounting anxiety or tension which was relieved the theft, arson (or whatever the compulsion was); and third, that the compulsion generated by the illness was so strong that the act would have been committed even though the circumstances were such that the accused could expect to be detected and apprehended forthwith when the offense was committed. It is evident that only very rarely, if indeed ever, do offenses committed within the frame-

74 work of a supposed compulsive psychoneurosis satisfy all three criteria, particularly the third. In consequence, for practical purposes, true irresistible impulse of 'inability to

adhere to the right' occurs only in psychotics. Since its legitimate applicability is extremely limited, the doctrine of irresistible impulse will be seldom invoked.

"*b.* Irresistible impulses in psychotics usually come about in connection with commanding voices, persuasive versions, or overwhelming delusions which, by their nature (and within the frame of reference of the psychosis), compel the patient to commit the act." (Italics in original)

Again we have the testimony of the psychiatrists in diametrical opposition. On behalf of accused, Captain Heisler maintained that a policeman at the side of the accused would not have deterred her, in fact she would not have even noticed his presence. Likewise, Captain Edelsohn, the psychologist, testified that the presence of the entire American army would not have restrained accused. Against this, Lieutenant Colonel Martin, Captain Graves, and Major Troy steadfastly maintained that the accused did not act under an irresistible impulse. Again it is a question of acceptance or rejection of conflicting testimony before the court. Accused's appellate counsel has vigorously attacked in his written brief, and in oral argument before this Board, the use of the so-called "policeman at the side" test in eliciting the opinions of the expert witnesses. As we have already indicated, this will be the subject of further consideration by the Board of Review, in a later branch of this opinion.

What we have said foregoing concerning the authority of the court, and the Board of Review, to accept or reject the evidence of any one or all of the expert witnesses concerning mental responsibility of accused, applies with equal force here. We cannot say that the court erred in concluding, based on the contested evidence before it, that the accused did not act under an irresistible impulse. There is nothing in the record, nor in the post trial affidavits of several of the witnesses, which would justify the Board of Review in upsetting the court's initial determination of this fact question. It appears to have been fully and properly litigated at the trial level (US v. Burns, *supra;* ACM 1254, McKinney, *supra*).

We should here add that, despite considerable diversity
75 of opinion in civilian jurisdictions as to application of this doctrine of irresistible impulse as a defense in prosecutions for homicides, the law is well settled in the military that the rule does obtain, and may be relied upon by an accused as a complete defense to the crime charged (US v Trede, *supra*). However, the rule is a strict one. In order to be available as a defense, the irresistible impulse must stem from mental disease or derangement; moral insanity or a retarded mental condition is not enough. In the *Trede* case the United States Court of Military Appeals recog-

nized the stringent features of the rule as applied in the military system in the following language:

> "While we realize that the phrase 'irresistible impulse' ordinarily connotes an impulse to commit a criminal act that cannot be resisted because of a mental disease which has destroyed the freedom of will, we likewise realize that experts in the medical field differ in the extent of its coverage. In this instance it appears the witnesses were using it in a manner more inclusive than is generally accepted in the legal field. This is of some importance because those jurisdictions which recognize the defense have been cognizant of the possibility of its misuse and misapplication. In virtually all cases the defense has been scanned closely to avoid that situation, and to circumscribe it within reasonable limits the legal authorities have recognized the defense only when it is shown clearly to be an outgrowth of a diseased mind. It seems reasonably certain that military law has hedged the doctrine in with the same restriction. * * *"

While the testimony of two witnesses on behalf of accused would meet this test, three testified to the con se. In this evidentiary controversy, we believe that the court co ectly resolved the issue against the accused, and as already stated, we find nothing within or without the record at this level to cause us to disagree.

We now turn to consideration of the post trial affidavits submitted by Lieutenant Colonel Martin, Captain Graves and Captain Edelsohn, which affidavits are included in the allied papers accompanying the record of trial. It is the opinion of the Board that it is entirely proper that consideration be given to the effect, if any, of these documents (US v Burns, *supra*).

76 In his post trial affidavit dated 10 June 1953, Lieutenant Colonel Martin stated that he believed Air Force Manual 160-42 overly restricted the sanity board in its determination of accused's true mental state. He contended that this publication, because of the strict test prescribed in connection with the irresistible impulse rule, i. e., "presence of a policeman at the side", made it impossible for the sanity board to conclude, other than that the accused was sane at the time of commission of the alleged offense. Had this strict limitation been absent, the (sanity) board could properly have determined that the accused acted under an irresistible impulse. However, within the limitations of the provisions of the manual, accused's mental condition necessarily had to be diagnosed as a dissociative reaction. This is substantially what Lieutenant Colonel Martin testified to before the court-martial as a witness on behalf of the prosecution. In his affidavit, this witness "summed up" his present belief that the accused was on 10 March, temporarily insane.

In the affidavit of Captain Graves, affiant expressed the same opinion concerning the limitations imposed by the provisions of the service manual referred to. However, his disagreement does not apparently challenge the irresistible impulse test which was applied, but rather, is a reassertion of his prior in-court testimony to the effect that there was no evidence of premeditation.

Captain Edelsohn's affidavit is a detailed resumé of the various types of tests he had applied to accused, and his findings as to accused's mental condition based upon such tests. He reiterated his conclusion that the accused was psychotic, specifically, paranoiac schizophrenia. This he had already testified to before the court-martial (R. 288, et seq.).

We are unable to find in these post trial affidavits sufficient disagreement in the opinions of affiants, as against their testimony at trial, to substantially impeach their in-court testimony to the extent that any reasonable doubt as to the sanity of the accused has been established. While Lieutenant Colonel Martin had characterized accused's mental condition while testifying before the court as a dissociative reaction, and in his affidavit he describes her mental state as temporary insanity, we are nevertheless of the opinion that his present disagreement with his prior testimony is not sufficient to tip the scales to the extent that a reasonable doubt
77 exists as to accused's sanity. It should be noted that the post trial assertions of Captains Graves and Edelsohn are not in appreciable disagreement with their prior testimony before the court. Except for the additional opinion of Colonel Martin that the accused was temporarily insane, we find very little in these affidavits other than a re-statement of the in-court testimony of affiants that they are not in agreement with the concepts of mental responsibility as applied in military proceedings. Likewise, we are not overly impressed with the argument that these witnesses were unduly restricted in their findings and testimony before the court by reason of the provisions of the disputed manual. We must not lose sight of the significant fact that the post trial affidavit of Lieutenant Colonel Martin, and likewise that of Captain Graves, attacks the limitations imposed on the *sanity board*—not their testimony before the court. However, the board proceedings were held in March, sometime prior to the alleged manual change, and, accordingly, the test as it then existed was the correct one for the board's consideration. While the assailed provisions of this publication might well have been the subject of a recommended change, mere disagreement by those who are called upon to comply therewith does not lend itself to strong conviction here. Both witnesses were aware of these limitations at the time they testified. Nevertheless, they testified at length on the general field of psychiatry in its relation to mental responsibility, and both, on cross-examination, stated unequivocally that they had not changed their opinions

since rendering their findings in the board proceedings. It is not without some consequence that the "policeman at the side" test was also the standard relied on by the defense at trial, in an attempt to establish that the accused did commit the fatal act as a result of an irresistible impulse.

The proceedings of the sanity board were not before the court, but rather the evidence of the individual members who appeared and testified in person. The board proceedings, we logically assume, were, as customary, conducted for the purpose of furnishing information to the convening authority to ascertain whether or not accused's mental condition was such as to warrant trial for the alleged acts. Again, the determination of this preliminary question by the board was not determinative of the guilt or innocence of the accused.

78 Nor are we able to agree that the limitations assertedly imposed by the provisions of this manual so restricted the sanity board in its findings that it became the victim of "command influence". It is our understanding that this otherwise objectionable, but infrequent, practice is predicated upon the rule that a convening authority or other superior may not inject a personal, as distinguished from an official, interest in the outcome of judicial or other proceedings (UCMJ, Art. 37; US v. Grow [No. 2050], 3 USCMA 77, 11 CMR 77). Air Force Manual 160-42 was promulgated by authority of the Secretary of the Air Force, in conjunction with the Secretary of the Army. It would indeed be strange if these responsible officials in the structure of the Department of Defense would have a personal interest in the outcome of a sanity board proceedings, even assuming, without conceding, that this publication in any sense restricted the findings of the members of such board. It should be noted that the very first paragraph of this manual (sec. 1, par. 1, p. 1) enjoins the medical witness to familiarize himself thoroughly with the provisions of Chapter XXIV, Manual for Courts-Martial, 1951, relative to the legal concepts of mental responsibility and capacity as therein defined. We find no merit in appellant's contention that the sanity board members were unduly subjected to superior command influence by use of the standards set forth in the publication under attack.

Examination of the testimony of these witnesses discloses beyond question that they were permitted to testify generally concerning the entire field of psychiatry in relation to mental responsibility, far beyond the scope of the Manual. Furthermore, we are not prepared to say that a court-martial, in determining the issue of mental responsibility according to the established and accepted standards of military law, is required to hear, or even should be subjected to, a great deal of testimony of psychiatrists, and those who may be otherwise qualified to express professional opinions but whose opin-

ions are based on a determination by methods other than those acceptable in the military system. Certainly it would have been of no aid to the court to have been exposed to additional voluminous evidence generally on this subject, but against which it would be unable to fit the military test of mental responsibility as defined in the Manual for Courts-Martial, 1951, and the long line of military decisions which have interpreted the extent and scope of these standards. Air Force Manual 160-42 does not prescribe the legal standards or tests of sanity of an accused on trial before
79 a court-martial. Rather this appears to be a guide for expert witnesses to aid them in the interpretation of the legal standards prescribed in the Manual for Courts-Martial. In this connection, see AFM 160-42, par. 1; CM 360857, Smith, *supra*; also 58 American Jurisprudence, Witnesses, section 839.

Appellate counsel for the accused lays great stress on the fact that certain language appearing in paragraph 5 of Air Force Manual 160-42 was changed in certain aspects in the publication of the same title and number issued in May of 1953, three days prior to trial, as a successor to the previous manual issued in September of 1950. In the 1950 manual, the "policeman at the side" test was the criteria applied to determine whether or not the accused acted under an irresistible impulse. The 1953 publication states the test as follows:

> "* * * and, third, that the compulsion generated by the illness was so strong that the act would have been committed even though the circumstances were such that the accused could expect to be detected and apprehended forthwith when the offense was committed." (par. 5*a*)
>
> * * * * *
>
> "If the medical officer is satisfied that the accused would *not* have committed the act had the circumstances been such that immediate detection and apprehension was certain, he will not testify that the act occurred as the result of an 'irresistible impulse.' No impulse that can be resisted in the presence of a high risk of detection or apprehension is really very 'irresistible.'" (par. 5*c*) (Italics in original)

From our comparison of the prior and present provisions of this manual, we are of the opinion that they reflect no substantial change. Both are predicated on a theory of immediate detection and certain apprehension. The fact that the policeman is at the side of the offender or at some distance removed does not substantially alter the standard as in either case, the resistance element is founded upon fear of discovery and punishment. We are unable to agree that the 1953 publication constitutes a rejection

by the services of the prior theory applicable to this defense.
80 Certainly it would require fine interpretation to discern any appreciable difference in this standard, as between the present and former manuals.

We are of the opinion that any limitations which the witnesses felt bound by in testifying before the court-martial, if such in fact they believed to exist, have been fully dissipated by their post trial affidavits. While we are aware that these documents are only before the Board, and were not before the court-martial which convicted the accused, we have given careful consideration to their contents and possible effect on the findings. As we previously pointed out in an early part of this opinion, we, as a Board of Review, are entitled not only to consider all of the evidence presented to the court-martial, and to weigh such evidence and determine controverted issues of fact, but we likewise may, and we have, fully considered the post trial reports of the medical witnesses. We find no basis in the latter for disagreement with the court's findings. We are firmly convinced that the result would have not been otherwise had the contents of these affidavits been presented to the court by the witnesses at the time of trial.

In our view of the evidence, we conclude that the accused, at the time of the alleged offense, suffered a dissociative reaction, exactly as three witnesses for the prosecution testified at the trial. This is not a psychosis, but rather a psychoneurotic disorder. Air Force Regulation 160-13A, Joint Armed Forces Nomenclature and Method of Recording Psychiatric Conditions, 1949, is a publication designed to provide a nomenclature of psychiatric conditions consistent with the concepts of modern psychiatry. Paragraph 5 contains a description of psychoneurotic disorders, and insofar as here pertinent provides as follows:

"5. Psychoneurotic Disorders

"This generic term refers to psychiatric disorders resulting from the exclusion from consciousness (i. e., repression) of powerful emotional charges, usually attached to certain infantile and childhood developmental experiences. Hereditary, constitutional organic situational, and cultural factors are involved, but the extent to which they are contributory to the particular disorder is difficult to determine. However, these factors should be carefully considered in evaluating 'external precipitating stress' and 'premorbid personality and
81 predisposition' (pars. 13 and 14). These repressed emotional charges, which may not be apparent without an extensive and deep investigation of the personality, may or may not be adequately controlled in the absence of external stress. Longitudinal (lifelong) studies of individuals with such disorders usually present evidence of periodic or constant mal-

adjustment of varying degree. Special stress may make the symptomatic expressions of such disorders acute.

"The chief characteristics of these disorders is 'anxiety,' which may be either 'free floating' and unbound ('anxiety reaction'), and directly felt and expressed, or it may be unconsciously and automatically controlled by the utilization of various psychological defense mechanisms (repression, conversion, displacement, etc.). In contrast to psychotics, patients with psychoneurotic disorders do not exhibit gross distortion or falsification of external reality (delusions, hallucinations, illusions) and they do not present gross disorganization of the personality.

"Anxiety in psychoneurotic disorders is a danger signal felt and perceived by the conscious portion of the personality (ego). Its origin may be a threat from within the personality—expressed by super-charged repressed emotions, including particularly such aggressive impulses as hostility and resentment—with or without stimulation from external situations, as loss of love or prestige, or threat of injury. The various ways in which the patient may attempt to handle this anxiety will result in the various types of reactions listed below.

* * * * *

"*b. Dissociative reaction.*—This psychoneurotic reaction represents a type of personality disorganization which proves to be in the majority of instances a neurotic disturbance. The diffuse dissociation seen in some cases of acute combat exhaustion may occasionally appear psychotic, but nearly always the reaction becomes neurotic.

82 "In acute cases of such reaction, the personality (ego) disorganization appears to permit the anxiety to overwhelm and momentarily govern the total individual, resulting in aimless running or 'freezing'. In other cases, the repressed impulse giving rise to the anxiety, may be either discharged or deflected into various symptomatic expressions such as fugue, amnesia, etc. Often this may occur with little or no participation on the part of the conscious personality.

"These reactions should be differentiated from schizoid personality, schizophrenic reactions, and from analogous symptoms in some other types of neurotic reactions. Formerly, this reaction has been often classified as a type of 'conversion hysteria.'

"The diagnosis should specify the symptomatic manifestations of the reaction, such as depersonalization, dissociated personality, supor fugue, amnesia, dream state, somnambulism, etc."

It will not require a restatement of the evidence at this juncture to sufficiently demonstrate that accused's entire history vividly reflects a neurotic state from early childhood. Commencing with the testimony of lay witnesses who appeared before the court—neighbors and friends of accused and deceased—accused's own evidence before the court-martial, and the unanimous opinion of the expert witnesses, it is apparent that accused has suffered more or less throughout her life, in varying degrees, powerful emotional changes, prolonged periods of nervous anxiety, frustration, and mental disturbances. As pointed out in the last quoted authority, these are usually indicative of certain hereditary constitutional and cultural factors, which are frequently attached to various infantile and childhood developments. As further stated in the above authority, however, the existence of these factors usually results in a dissociative reaction, which, in some types of cases may occasionally appear psychotic, nearly always becomes neurotic. Evidence of the psychiatric witnesses, while not in complete agreement, points to the fact that accused suffered, at the time of the incident, some degree of mental impairment, in her ability to distinguish right from wrong, and to adhere to the right. However,

83 impaired ability to adhere to the right, or distinguish right from wrong, or partial irresponsibility, is not a defense to crime (MCM, 1951, pars. 120, 122; ACM 4616, Brown, 4 CMR 633; ACM 2810, Pelate, *supra;* ACM 2388, Anderson [BR], 3 CMR [AF] 293; ACM 873, Carras, *supra;* CM 351893; Mungo, 3 CMR 325, affirmed in part 11 CMR 18). The impairment to operate as a defense must amount to legal insanity within the standards prescribed by the Manual for Courts-Martial, 1951, paragraph 120, i.e., to constitute lack of mental responsibility the impairment must not only be the result of mental defect, disease or derangement, but must also completely deprive the accused of his ability to distinguish right from wrong or to adhere to the right with respect to the act charged (AFM 160-42, par. 7). The court-martial did not, obviously from its findings, consider the degree of impairment, if any, suffered by accused sufficient to meet this test. We discern no reason from our review of the record of trial to come to a different result with respect to this issue.

We have carefully considered all of the evidence in this voluminous record of trial, and we have attempted to present herein an impartial and complete resumé thereof. We have not overlooked the extensive testimony concerning the accused's mental and physical condition, not only as presented by the witnesses who had studied her lifelong history in this regard, but also all of the evidence concerning her illness, mental state, and actions prior to, at the time of, and following commission of the fatal act.

Nor do we minimize the import of the highly unusual, if not

startling fact, that according to the accused, after administering the fatal blows, she entered the bed of deceased, and apparently remained therein with the corpse throughout the night. This she disclosed to several witnesses on the following day, and in several subsequent interviews. However, bizarre conduct on the part of one who has only recently committed a heinous act is not uncommon (see The Crown v. James Frank Rivett, 34 Cr. App. R. 87). Likewise, it appears that accused attempted to take her own life by consumption of a large dosage of barbiturates shortly after she had slain her husband, according to her own testimony in court, and her admissions to other witnesses. But it is not infrequent, common experience demonstrates, that suicide attempts follow commission of serious crimes. Whether this is to seek release in eternal sleep, or to escape the consequences of an abortive act is
84 something we cannot answer. This will never be known in any case, unless witnesses are forewarned of the intended suicide. In any event, we are unable to attach the significance to these acts, which appellate defense counsel characterizes as "dramatic", as has been urged before this Board on behalf of accused. To label every attempted suicide following commission of an offense as an act of insanity would fly in the face of experience, and we decline to so do.

The record is quite clear that accused was not considered psychotic on 10 March, at the time of her visit to Captain Heisler. At approximately 5:30 in the evening of that date, she appeared normal and rational to her friends. The lethal weapon, significantly, was found in its usual repository on the first floor of the dwelling occupied by accused and deceased, after the dead body was discovered. Accused was able to converse the next day with at least one airman, and she succeeded in taking her children to the nursery. At this point she seemed highly emotional, agitated and distressed. Accused's recounting of the details of the fatal night indicate at least sufficient presence of mind to recall what transpired with considerable clarity. Additionally, the evidence adduced by the prosecution and defense from the numerous expert witnesses, presented to the court, although somewhat in conflict, a thorough evaluation of accused's mental condition. It is not frequent that a case comes before the Board of Review wherein this highly difficult issue is so thoroughly and fairly presented to the court for its initial consideration. Counsel for accused and for the Government were extremely zealous and capable in their presentations. It would be difficult to imagine what more could have been done at the trial level than was done in this case.

From all of the evidence, which we have carefully evaluated, for and against the issue of sanity, we cannot say that there is in the minds of the members of the Board of Review, a reasonable doubt as to accused's sanity (and mental responsibility) at the time of

the commission of the offense (ACM 6114, Procopio, *supra*). The matter, in our opinion, was fully and fairly presented to the court, and properly resolved against the accused. We have discovered no basis for disagreement with the findings of the court-martial in this regard (U.S. v. Burns, *supra*; ACM S-1254, McKinney, *supra*).

We turn now to accused's third assigned error.

85 Appellate counsel for the accused next contends that the law officer's instructions concerning the applicability of the defense of irresistible impulse erroneously included the "policeman at the side" test. Again, it is urged that by reason of the changes in Air Force Manual 160-42 three days prior to trial, the former test of irresistible impulse set out above had been rejected. Substantially the same argument is advanced in support of this claimed error as was put before the Board in relation to the first two assigned errors. We have already stated in considerable detail our views as to the effect, if any, of the change in the provisions of the service manual referred to. It is unnecessary to re-state our position here.

In order that we may determine the result, if any, of reference to the policeman test as included in the instructions of the law officer, it is proper that we set forth in some detail the entire instruction of the law officer as to the defense urged. It would be injudicious and unfair to consider only isolated portions thereof, without due regard to the complete text of the instructions given. Instructions on the question of sanity, like all other instructions, must be read as a whole (U.S. *v.* Biesak, *supra*; Matheson v. U.S., 227 U.S. 540, 57 L. ed. 631, 33 S. Ct. 355; Agnew *v.* U.S., 165 U.S. 36, 41 L. ed 624, 17 S Ct. 235; State v. Green, 86 Utah 192, 40 P2d 961). As to the defense of irresistible impulse, the law officer instructed the court:

> "You are further advised that if you have a reasonable doubt as to the mental responsibility of the accused for the offense charged, the accused cannot legally be convicted of that offense. A person is not mentally responsible in a criminal sense for an offense unless he was, at the time of the offense, so far free from mental defect, disease or derangement, as to be able concerning the particular act charged, both to distinguish right from wrong and to adhere to the right. The phrase 'mental defect, disease or derangement' comprehends those irrational states of mind which are the result of deterioration, destruction or malfunction of the mental, as distinguished from the moral, faculties. To constitute lack of mental responsibility, the impairment must not only be the effect of mental defect, disease or derangement, but must also completely deprive the accused of his ability to distinguish right from wrong or to adhere to the right as to the act charged.

86 "The ability to distinguish right from wrong as to the act charged is a concrete, not an abstract, concept. The question is, whether the accused knew that the particular act with which she is charged, was wrong in the sense that the military, or society generally, considers the act wrong. The appraisal of the act within the accused's own private ethical system is irrelevant. Even though the accused may have been able to distinguish right from wrong as to the act charged, she is nevertheless not mentally responsible if, because of some mental defect, disease or derangement, she was unable to adhere to the right as to the act charged. An inability to adhere to the right does not exist, unless the act is committed under an irresistible impulse which completely deprives a person of the power of choice or volition. If the accused would not have committed the act had there been a military or civil policeman present, she cannot be said to have acted under an irresistible impulse. A mere defect of character, will power or behavior, as manifested by ungovernable passion or otherwise, does not necessarily indicate a lack of mental responsibility, even though it may demonstrate a diminution or impairment of the ability to adhere to the right as to the act charged.

"The accused initially is presumed to have been sane at the time of the alleged offense. This presumption merely supplies the required proof of mental responsibility and authorizes you to assume the accused's sanity until evidence is presented to the contrary. When, however, as in this case, substantial evidence tending to prove that the accused was insane at the time of the alleged offense is introduced, the sanity of the accused is an essential issue of fact. The burden of proving the sanity of the accused beyond a reasonable doubt, like every other fact necessary to establish the offense charged, is on the prosecution. If, in the light of all the evidence, including that supplied by the presumption of sanity, you have a reasonable doubt as to the mental responsibility of the accused at the time of the alleged offense, you must find the accused not guilty of that offense.

87 "The fact that the issue of sanity was resolved against the accused during the trial as an interlocutory matter does not in any preclude you from considering the question of mental responsibility in connection with the findings on the general issue of guilt or innocence." (R. 331-332)

In United States v. Hatchett (No. 1137), 2 USCMA 482, 9 CMR 112, the United States Court of Military Appeals had before it for consideration an instruction concerning the matter of reasonable doubt. The law officer, after attempting to define reasonable doubt had added: "* * * In other words, if there is a balance,

you have to resolve the question in favor of the accused. * * * *" In disposing of appellant's contention that this constituted reversible error, the court used the following language:

> "The difficulty with the assignment is that the particular quoted portion of the instruction is torn from a complete charge and at first blush it gives a misleading, confusing and erroneous impression. However, there is a well-understood rule of law, i.e., that instructions must be considered in their entirety and if, when gathered together by their four corners, they state the law properly and with sufficient clarity to be understood by the members of the court-martial, then they are not prejudicial even though one sentence may be technically incorrect. In this connection there were other instructions given by the law officer which influence our determination that, when considered as a whole, the charge could not be interpreted as changing another well known and easily understood rule of law that the Government must prove the accused guilty beyond a reasonable doubt."

Testing the instant instructions by the "well-understood rule of law" referred to in the foregoing opinion of the Court of Military Appeals, we are unable to find wherein the court-martial was either misinformed or inadequately instructed in respect to the defense of irresistible impulse. The objectionable portion of the instructions is but a single sentence included within a comprehensive and otherwise complete and correct statement of the law on this subject, insofar as material here. Indeed, it would take extremely careful analysis to seize on the statement attacked as being incorrect when viewed with the entire instructions given, and to conclude that the instruction was in fact either misleading or incorrect (US v Hatchett, *supra*). We note that the instruction given in this regard was far more complete than that requested by defense counsel at the trial (see App Ex 11), although it should be pointed out that the requested instruction did not include the policeman at the side test. But it is not necessary that the law officer instruct in the precise language proposed by counsel, so long as he complies with the substance of the request (US v Beasley [No. 2173], 3 USCMA 111, 11 CMR 111; U.S. v. Offley, et al, [No. 1841], 3 USCMA 276, 12 CMR 32, affirming CM 355931, Offley, et al, 9 CMR 223). Here defense counsel's request was fully complied with, and it is significant to note that he did not include in his proposed instruction any other standard or test than that given, which was in fact in accordance with the theory of the prosecution and defense throughout the entire trial of the case. Had defense counsel desired, or been aware of, any other theory of criminal immunity to be submitted to the court in the form of

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instructions, he should have come forward with them. Considering the instructions given as a whole, we find no fault with either their completeness or correctness, and accordingly, we conclude that no error prejudicial to the accused resulted from the instructions in the form given (US v Hatchett, *supra*; CM 355119, Anderson, 8 CMR 212).

By the fourth assigned error, it is argued that the law officer improperly curtailed defense cross-examination of expert witnesses in two respects. The first claimed erroneous exclusion of evidence concerns the testimony of Captain Graves. On recross-examination the witness was asked:

> "Now, you made some statement earlier about the rules under the military—you were reaching certain conclusions; what would have been your conclusions, Doctor, if you were evaluating this particular patient, with the evidence that was available to you, without the rules that the military laid down?" R. 265)

An objection to this line of cross-examination on the ground of immateriality was sustained. We discern no error in the law officer's ruling. Initially, the scope of cross-examination is a matter within the sound discretion of the trial judge (Glasser v. 89 United States, 315 US 60, 62 S. Ct. 457; District of Columbia v. Clawans, 300 US 617, 81 L. ed. 843, 57 S. Ct. 660; McKnight v. United States, 122 F. 926; Alford v. United States, 282 US 687, 75 L. ed. 624, 51 S. Ct. 218; US v. Heims [No. 1497], 3 USCMA 418, 12 CMR 174), albeit the fact that cross-examination on relevant issues pertaining to matters brought out on direct examination is a matter of right (MCM, 1951, par. 149 *b*; ACM 6071, Dunn, 9 CMR 763). Aside from any consideration of abuse of discretion here by the law officer, we believe that the propriety of his ruling, excluding the evidence sought to be elicited, may be founded on firmer ground. Here the witness had testified to the fact that psychiatric standards might vary between civilian concepts, and as applied in the military system, insofar as recording psychiatric conditions are concerned. As stated specifically by this witness: "In civilian psychiatry, those would be considered a kind of mental illness. In military psychiatry, it is not considered to be an illness, a psychiatric illness" (R. 263). The short answer to appellant's assertion here is that the court-martial was not interested in civilian standards or concepts of psychiatric classification. Military courts are concerned only with the standards of mental responsibility prescribed in the Manual for Courts-Martial, 1951, as promulgated by the President, pursuant to congressional authority contained in Article 36, Uniform Code of Military Justice (PL 506, 81st Cong., c. 169; sec. 1, 64 Stat. 108; Title 50 USC [chap. 22], secs. 551-736; E. O. 10214, 8 Feb. 51). Further evidence sought

to be brought forth by defense counsel as to the witness' opinion as to what certain factors might or might not reflect as to the mental condition of a given patient, by other than applicable military criteria would be immaterial, and would in all probability, add more to confuse than clarify the real issues in the minds of the court members. We conclude that limiting the cross-examination here was entirely proper. We might observe, however, that this record is replete with testimony that different standards do prevail between the civilian and military community in this regard, and exclusion at this point certainly did not leave the record barren of considerable, although unnecessary, evidence on this point (see US v. Heims, *supra*).

In earlier cross-examination of the same witness, defense counsel had brought forth that certain stains found on accused's pajamas (Pros. Ex. 10) had been determined to be fecal material; and further, that one suffering a dissociative reaction might lose sphincteral control (R. 259-262). However, he had further testified that even had this physical reaction occurred, it would ordinarily have no appreciable connection with the severity of the patient's dissociative reaction. On objection, and following argument, the law officer sustained the objection "at this time", for the reason that he apparently considered that the hypothetical question posed did not encompass facts already before the court. Thereupon the court recessed. On reconvening, defense counsel continued cross-examination, without further reference, however, to the subject of fecal material found on the pajamas in question. We are unable to agree that further cross-examination on this subject was unduly limited. The court's ruling was by no means final; indeed, it inferentially included an invitation, or at least a suggestion, that the matter might be pursued further. It is not insignificant that all of the prosecution medical witnesses, who had been subjected to intensive cross-examination, were in agreement that accused did suffer a severe dissociative reaction. Hence, it is difficult to perceive how further evidence along the line indicated would have served to establish a fact which had actually already been settled as much by witnesses for the prosecution as for the defense. Be that as it may, we do not construe the ruling of the law officer as forever foreclosing further cross-examination of this or any other witness on the matter at hand. Certainly not to the extent that he abused his discretion in sustaining the objection for the time being (Glasser v. United States, *supra*; District of Columbia v. Clawans, *supra*; Alford v. United States, *supra*; Kretske v. United States, 313 US 551 85 L. ed. 1515, 61 S. Ct. 835; McKnight v. United States, *supra*; United States v. Heims, *supra*). Assuredly the error complained of, if error there be, would not warrant reversal (see 58 Am. Jur., Witnesses, sec. 673).

We come now to the fifth assigned error raised by appellate

counsel for the accused before this Board. It is here contended that the law officer on two separate occasions failed to instruct the court properly as to the accused's mental state insofar as it may have affected her ability to premeditate. During the course of the trial, the law officer, on at least two occasions, instructed the court members as to the elements of the offense of premeditated murder, and also the lesser included offense of unpremeditated murder (R. 305-307, 330-332). It is urged that the law officer's failure to instruct the court that the accused, by reason of
91 some mental disorder, might be incapable of premeditation results in fatal error.

We have been favored by appellant with a formidable array of authority from state jurisdictions on this question. As pointed out in appellant's brief, several states follow the rule that mental impairment may be sufficient to negate premeditation or deliberation in a case of murder. Conversely, other state jurisdictions hold that mental impairment has no connection with the degree of the crime of which the accused may be found guilty. That is to say, that the accused must either be found guilty of murder or be acquitted. It is unnecessary to enumerate the numerous state jurisdictions on both sides of this question. The most complete collection of cases in favor of and opposed to the accused's theory herein is found in the decision of the Supreme Court of the United States in Fisher v. United States, 328 US 463, 90 L. ed. 1382, 66 S. Ct. 1318. In that case, the Supreme Court had for review the decision of the United States Court of Appeals for the District of Columbia in the case bearing the same title (149 F. 2d. 28). There the accused had been convicted of murder. Psychiatric testimony had been introduced in the trial court which would indicate that the accused, by reason of his aggressive tendency and low emotional response, was the type of person likely to conceive and carry into effect a brutal murder. Appellant therein asked that the jury be instructed that, in considering the intent or lack of intent to kill on the part of the defendant, premeditation or no premeditation—deliberation or no deliberation—and whether or not at the time of the fatal act the defendant was of sound memory and discretion, it [the jury] should consider the entire personality of the defendant, including his mental, nervous, emotional and physical characteristics. The requested instruction was denied. In disposing of this claimed error on appeal, the United States Court of Appeals for the District of Columbia, speaking through Associate Justice Arnold, had this to say:

> "The instruction confuses the issue of insanity with the question whether the psychopathic characteristics of the appellant prevented him from forming the deliberate intent necessary to constitute first degree murder. For that reason

alone it was properly refused. But even if these issues had been separated there was no evidence justifying an instruction on either of them. So far as insanity is concerned there was no testimony indicating appellant did not know the nature and character of his act or was not conscious of the difference between right and wrong. With respect to the issue of deliberation the psychiatric testimony went no further than to say that appellant was the kind of person who was apt to conceive and carry into effect a brutal murder of this character because of his psychiatric aggressive tendencies and his low emotional response to situations which would deter ordinary men. But it is obvious that brutal murders are not committed by normal people. To give an instruction like the above is to tell the jury that they are at liberty to acquit one who commits a brutal crime because he has the abnormal tendencies of persons capable of such crimes." (see also CM 360857, Smith, *supra*).

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The court quoted with approval from the decision of the same court in Hart v. United States, 130 F. 2d 456, 458 as follows:

"'The rule suggested by appellant would become a refuge for ill-tempered, irresponsible citizens; it would put a premium upon lack of self-control and would penalize the reasonable man, * * * because of the restraint which he practices in his dealings with his fellows.' Hart v. United States, 1942, 76 U.S. App. D.C. 193, 195, 130 F. 2d 456, 458."

We have before us a recent decision of the United States Court of Military Appeals which we believe answers appellant's present contention before this Board. In United States v. Holman (No. 2132), 3 USCMA 396, 12 CMR 152, a similar argument was advanced before that tribunal. There it was claimed that the trial court erred in failing to furnish the court with instructions concerning the effect of the disturbed state of the accused's mind in relation to his ability to entertain a specific intent. The court disposed of this contention in the following language:

"We have considered accused's other assignments, and have concluded that they are without merit. The evidence was wholly insufficient to have required an instruction regarding intoxication and its legal effect. With respect to the evidence of sanity, it is clear that it, too, fell far short of showing legal insanity, as was similarly the case in United States v. Trede, 2 USCMA 581, 10 CMR 79, decided May 29, 1953. Our opinion in Trede provides a sufficient response, and a distinctly negative one, to the assertion of appellate defense counsel that—although

the evidence did not tend to establish legal insanity—the
93 law officer was required to instruct the court-martial that its members should consider the disturbed state of the accused's mind, in relation to his ability to entertain a specific intent, to the same extent and on the same theory that instructions might have been demanded had there been abundant evidence of intoxication."

The argument so vigorously pressed before this Board in the instant case was likewise advanced before the Supreme Court of the United States in Fisher v. United States, *supra*. In fact, the same theory was relied on, i.e., the effect of mental impairment insofar as the accused's ability to premeditate was concerned. In the *Fisher* case, Mr. Justice Reed, in speaking for the court, had this to say:

"The error claimed by the petitioner is limited to the refusal of one instruction. The jury might not have reached the result it did if the theory of partial responsibility for his acts which the petitioner urges had been submitted. Petitioner sought an instruction from the trial court which would permit the jury to weigh the evidence of his mental deficiencies, which were short of insanity in the legal sense, in determining the fact of and the accused's capacity for premeditation and deliberation. The appellate court approved the refusal upon the alternate ground that an accused is not entitled to an instruction upon petitioner's theory. This has long been the law of the District of Columbia. This is made abundantly clear by United States v. Lee, 4 Mackey (DC) 489, 495, 54 Am. Rep. 293. This also was a murder case in which there was evidence of mental defects which did not amount to insanity. An instruction was asked and denied in the language copied in the margin.

"It is suggested that the Lee Case was decided when murder under the District law was not divided into degrees and that therefore it was not proper to instruct as to the accused's mental capacity to premeditate and deliberate while now it would be. We do not agree. The separation of the crime of murder into the present two degrees by the code of law for the District of Columbia, March 3, 1901, 31 Stat. 1189, 1321, c.
854, is not significant in analyzing the necessity for the
94 proposed submission of the evidence concerning petitioner's mental and emotional characteristics to the jury by specific instruction. The reason for the change, doubtless, lay in the wide range of atrocity with which the crime of murder might be committed so that Congress deemed it desirable to establish grades of punishment. Cf. Davis v. Utah, 151 U.S. 262, 267, 270, 38 L. ed. 153, 155, 156, 14 S. Ct. 328. Homicide, at common law, the rules of which were applicable

in the District of Columbia, had degrees. Murder was 'with malice aforethought, either express or implied.' Blackstone, Book IV (Lewis ed., 1902), p. 195; see Hill v. United States, 22 App. D.C. 395, 401; Hamilton v. United States, 26 App. D.C. 382, 386-391; Burge v. United States, 26 App. D.C. 524, 527-530. Manslaughter was unlawful homicide without malice. Blackstone, Book 4, p. 191. As capacity of a defendant to have malice would depend upon the same kind of evidence and instruction which is urged here, it cannot properly be said that the separation of murder into degrees introduced a new situation into the law of the District of Columbia. As shown by the action of the District of Columbia courts in this case and the other District cases cited in this and the preceding paragraph, we think it is the established law in the District that an accused in a criminal trial is not entitled to an instruction based upon evidence of mental weakness, short of legal insanity, which would reduce his crime from first to second degree murder.

"Petitioner urges forcefully that mental deficiency which does not show legal irresponsibility should be declared by this Court to be a relevant factor in determining whether an accused is guilty of murder in the first or second degree, upon which an instruction should be given, as requested. It is pointed out that the courts of certain states have adopted this theory. Others have rejected it. It is urged, also, that since evidence of intoxication to a state where one guilty of the crime of murder may not be capable of deliberate premeditation requires in the District of Columbia an instruction to that effect (McAffee v. United States, 72 App. D.C. 60, 111 F. 2d 199, 205 l.c.), courts from this must deduce that disease and congenital defects, for which the accused may not be
95 responsible, may also reduce the crime of murder from first to second degree. This Court reversed the Supreme Court of the Territory of Utah for failure to give a partial responsibility charge upon evidence of drunkenness in language which has been said to be broad enough to cover mental deficiency. Hopt v. Utah, 104 U.S. 631, 634, 26 L. ed. 873, 874. It should be noted, however, that the Territory of Utah had a statute specifically establishing such a rule.

"No one doubts that there are more possible classifications of mentality than the sane and the insane. White, Insanity and the Criminal Law, 89. Criminologists and psychologists have weighed the advantages and disadvantages of the adoption of the theory of partial responsibility as a basis of the jury's determination of the degree of crime of which a mentally deficient defendant may be guilty. Congress took a forward step

in defining the degrees of murder so that only those guilty of deliberate and premeditated malice could be convicted of the first degree. It may be that psychiatry has now reached a position of certainty in its diagnosis and prognosis which will induce Congress to enact the rule of responsibility for crime for which petitioner contends. For this Court to force the District of Columbia to adopt such a requirement for criminal trials would involve a fundamental change in the common law theory of responsibility."

At the outset it should be noted that the law officer otherwise fully and properly instructed the court-martial on the elements of the offense of premeditated murder, and the lesser included offense of unpremeditated murder. Additionally, the court was instructed on the element of premeditation (R. 305-307, 330-332).

From the authorities which we have cited above, it appears quite clear to the Board of Review that there is no requirement that the court must, or even should, be instructed on the element of mental capacity insofar as the ability to premeditate is concerned, either in the Federal courts (U.S. v. Fisher, *supra*), or in military courts (U.S. v. Holman, *supra*), for the reason that there is no twilight zone between sanity and insanity. An offender is wholly sane or wholly insane (Holloway v. U.S., *supra*). We have considered the provisions of paragraph 9*a* of Air Force Manual 160-42, relied on by appellant herein for the proposition that a person may be
96 legally responsible in a criminal sense, but still lacking in sufficient mental capacity to premeditate. We have already indicated our views that this manual does not state the law, and it is binding on neither courts, witnesses, nor the Board of Review. This disposes of appellate defense counsel's fifth assigned error.

By the sixth assigned error we are called upon to make a determination of the correctness of the court's findings that the homicide of which accused was convicted was premeditated.

Murder is the unlawful killing of a human being without justification or excuse (MCM, 1951, par. 197*a*). Premeditated murder is murder committed after the formation of a specific intent to kill someone, and consideration of the act intended. A murder is not premeditated unless the thought of taking life was consciously conceived and the act or omission by which it was taken was intended. However, it is not necessary that the intention to kill shall have been entertained for any particular or considerable length of time. When a fixed purpose to kill has been deliberately formed, it is immaterial how soon afterwards it is put into execution (MCM, 1951, par. 197*d*). Appellant places great reliance on the testimony of Lieutenant Colonel Martin to the effect that there was no evidence of premeditation. The testimony of Captain Heisler and Captain Graves was to the same effect. Major Troy, on the other

hand, testified that the accused was mentally capable of formulating an intent to kill and to premeditate. Likewise, Captain Graves, in his post trial affidavit which we have previously referred to on several occasions in this opinion, stated that it does not follow that because a person is not insane that they nevertheless possess the mental capacity to premeditate. He reemphasizes his in-court testimony to the effect that there was no psychiatric evidence which would lead him to believe that there was a sufficient degree of conscious participation in the planning and execution of the act to characterize it as a premeditated crime. Likewise, Captain Edelsohn, as a witness before the court-martial, and in his post trial affidavit, expressed the opinion that the accused was psychotic. He steadfastly maintained his opinion that the act was not one of premeditation.

97 The question now confronting the Board of Review is whether it should accept and substitute for the court's findings the in-court and post trial opinions of witnesses concerning a fact question. Initially, we desire to point out that it is quite clear to us that premeditation is a fact question, and it may be inferred from the circumstances attending the killing. Whether or not there has been the required premeditation is a fact for the jury (court-martial) to resolve (U.S. v. McCrary [No. 4], 1 USCMA 1, 1 CMR 1). The trial court is entitled to examine all of the facts of the case and should carefully consider all of the evidence in reaching a finding as to whether or not premeditation existed (U.S. v. Goodman [No. 16], 1 USCMA 170, 2 CMR 76).

This assigned error requires that we reconsider a portion of the evidence pertinent to the element of premeditation. The record reflects that the victim was slain after he had retired and while asleep. The lethal weapon was a hand axe usually kept in a coal bucket on the first floor of the dwelling occupied by accused and her husband. The bedroom occupied by accused on the fatal night was on the second floor of the premises. The hand axe was found in its usual place on the first floor near the fireplace, following the fatal act. The record further reflects that the corpse was covered, and it is quite clear that this was for the purpose of preventing the discovery of the body by the children of the accused. The following day the accused informed Airman Goodwin that the deceased was not at home. We attach considerable significance to the fact that the accused, by her own admissions, used an axe with which to kill her husband and the record leaves no doubt that it was necessary for accused to secure this fatal implement from the first floor of the quarters occupied by the principals, carry it to the second floor bedroom, and after it had served its purpose, to return it to its usual repository. The situation here is not unlike that considered by an Army Board of Review in CM 354898,

O'Brien, 9 CMR 201, affirmed United States v. O'Brien No. 1915, 3 USCMA 105, 11 CMR 105. In its opinion, the United States Court of Military Appeals used the following significant language:

> "* * * On the morning in question—and this fact, perhaps, is the most significant of all—he purposely secured a pick mattock *in the basement*, ascended *to a second floor* bedroom, and killed his wife with it. Indeed, there is evidence which argues that his trip to the basement was made with the sole object of arming himself with the tool. In any event, the movement of the pick from basement to bedroom is of grave importance in its bearing on the question of premeditation. Considering the totality of evidence, we cannot say that it did not permit a determination by the court-martial of premeditation on the part of petitionar beyond a reasonable doubt and within the fair operation of reasonable minds. United States v. Shuler (No. 1599), 2 USCMA 611, 10 CMR 109, decided June 4, 1953." (See also U.S. v. Riggins, et al., [No. 1641], 2 USCMA 451, 9 CMR 81; U.S. v. Seehler [No. 1025], 3 USCMA 363, 12 CMR 119; U.S. v. Harvey and Wilson [No. 647], 2 USCMA 248, 8 CMR 48; CM 360857, Smith, *supra;* ACM 2891, Henderson, et al. [BR], 4 CMR [AF] 1051; CM 364221, Corey, 11 CMR 461; CM 352044, Swisher 3 CMR 367)

In view of the foregoing authorities, and our appraisal of the evidence in this case, we find nothing to justify a conclusion other than that the murder was an act of premeditation. With due respect to the opinion of the psychiatrists, we find no basis in law for substitution of their opinions on this purely fact question for that of the court-martial. Accordingly, we are not disposed to set aside the court's determination of this question, which we conclude is fully supported by the evidence, in favor of the in-court and ex parte opinions of the witnesses referred to.

Under its findings, the court-martial could not sentence accused to less than life imprisonment. While we have the power to modify this sentence (UCMJ, Art. 66), we find no basis for reduction of the sentence in this case. Anything less than life imprisonment, on the basis of the entire record before us, would be inappropriate and unwarranted.

For the foregoing reasons, the Board of Review finds the findings of guilty and the sentence correct in law and fact. Article 66(*c*) having been complied with, the same are hereby

Affirmed.

GORDON O. BERG, (Dissent)
H. L. ALLENSWORTH.

100 Department of the Air Force

Office of the Judge Advocate General
Washington, D. C.

30 April 1954

AFCJA-23/5

ACM 7031

UNITED STATES

v.

CLARICE B. COVERT, a person accompanying the Armed Forces of the United States without the continental limits of United States and the possessions thereof

DISSENT BY PISCIOTTA, JUDGE ADVOCATE

I dissent from the decision of the majority members of the Board of Review because I do not believe the accused was legally sane at the time of the commission of the offense.

There is no dispute as to the facts that on 10 March 1953 the accused did attack her husband with an axe resulting in his death. In order to better understand my final conclusion as to the accused's sanity, it becomes necessary to outline the life history, background, and events leading to the unfortunate incident.

The accused was an only child and the product of a broken home. When she was born, her father was very much disappointed that she was not a boy. He resented her, showed this resentment during her childhood by treating her as a boy, and made several attempts to dispose of her; on one occasion, attempting to suffocate her by putting a pillow over her head (R. 182, 183). At one time he attempted to throw her mother out of a hotel window and, on another occasion, tried to choke her in the presence of the accused.

Accused, then a child, was terrified at these events (R. 114).
101 Her father was a heavy drinker, gambler, and ne'er-do-well, continuously changing jobs, forging checks and, after several separations, finally deserted his family in 1932 when the accused was twelve years of age. She has not seen her father since. Her mother attributed the father's desertion to the fact that the accused was a girl. Her mother had been left a legacy of $7,500 by her first husband, which accused's father squandered. He was a cruel man and tormented the accused. Like accused's husband, he forged several checks which her mother had to make good (Def. Ex. F, R. 170). As a child, accused never felt the love and consideration of either parent and felt unwanted, alone, and afraid. Because of their financial difficulties and poor home surroundings, she did not make friends and avoided people (R. 115). After

finishing high school, she left home, went to nursing school, and then worked as a secretary until she met her husband (the victim). He was a second lieutenant of infantry at the time. They were married in March 1943; and two months thereafter he went overseas. While overseas, he got into some financial difficulty, and she had to send him $629 out of her savings to keep him out of the "stockade" (R. 116). He was released from the service in November 1945, didn't work, but drank and gambled heavily, spending approximately $5,000 which she had saved while he was away. In March 1946, he enlisted in the Air Force as a master sergeant. While she was pregnant, before her first son was born, he gambled $450 out of their joint bank account and that was the last of all their savings (R. 117). He wrote several bad checks on banks where he had no account, and accused always had to redeem them to keep him out of jail. Finally, when all her savings had been squandered by his heavy drinking and gambling, she had to cash her insurance policy in order to pay the expenses incident to the birth of her first child. Her husband had no sense of responsibility. All he thought about was wine, whiskey, gambling, and buying cars. In February 1948, he demanded money to redeem a check which he had forged to pay some gambling losses, and, when she refused, he left her and their child. She started divorce proceedings after a few months' separation, but abandoned the divorce action and went back to him because, as she testified, "* * * I couldn't stay away from him. I was a nervous wreck the whole time I was away from him. I couldn't eat; I couldn't sleep; I couldn't even hardly hold my job down." After she returned to him she felt better (R. 118, 119). She thought he would stop his drinking and gambling, but he did not. He continued forging
102 checks and squandering his money on drink and gambling. They could never get ahead. He came home late practically every night. He ignored the children and "certainly didn't think of their future" (R. 76). When he was sent to England in September 1951, she was anxious to be with him, and when he was transferred from Ruislip to Upper Heyford, she was so anxious to be with her husband that even one room in a hotel would have been sufficient (R. 119, 167, 175, 195). While in England, she was advised that all of their household goods which had been in storage in the States burned. They had no insurance to protect this loss, and this worried her (R. 199, 230). She worried about her children's health. The youngest had asthma, and, although old enough to talk, he didn't say a word (R. 89, 101, 119, 161, 177).

In December 1952 she was advised that her aunt (her father's sister) had died and left her a legacy of almost $50,000. Her husband began to make plans on how to spend it. He planned to buy a new car, make a trip around Europe, a trip home, and to buy

clothes. She did not want to spend it, but wanted to put it in a trust fund for the children's education and for a home when her husband retired. The difference in plans did not cause friction or disagreement between them, but worried her and was the beginning of her illness. She had considered leaving him, but just couldn't do it. She had tried before, but couldn't be without him (R. 97, 120).

In February she became very ill. She felt as if she were dying, felt as if she were passing out, and just couldn't go on. Finally, she got so desperate that she went to the infirmary to see a doctor (R. 120). Captain Cogar gave her a bottle of phenobarbitol, but the medicine did not do her any good; she couldn't sleep nor eat, and she was getting progressively worse. The doctor thought she had a toxic goiter and arranged for her admission to the hospital. She was then hospitalized at the 5th Group General Hospital at Burderop Park from 25 February to 3 March 1953. Clinical examination failed to disclose anything organically wrong with her (R. 121). She was given sixteen blue sleeping tablets and took them regularly. On Saturday night, March 7, she took four tablets. She couldn't explain why. She didn't know whether they would kill her or not. The next day she kept thinking of morbid things out of her past. She had been told by her mother that when she was born she was not expected to live and that her father's parents had picked out a coffin for her. They did not want her to live. She thought
103 about her father trying to push her mother out of a hotel window and about her father trying to smother her when she was a child. These and other things that happened in her childhood and what she had been told by her mother, all of which she had no reason to think about at this time, flashed in her mind "like pictures on a screen" (R. 122, 123, 130). She became so desperate she got up from the dinner table and ran to the dispensary to see a doctor (R. 122). She saw Doctor Cogar on Monday, March 9, and wanted to get back into the hospital. She felt there was something wrong with her, that she had to go that night, and, if they didn't take her, she was going to "explode." He gave her some more tablets and tried to get her admitted to the hospital, but could not (R. 123). That night, Monday the 9th, she took two tablets, and on the 10th, the fatal night of the incident, she took about fifteen; all she could find (R. 124).

It is not intended to disparage the memory of the accused's husband, the victim of the unfortunate incident, but in order to better understand the tormented, anxious, and worried life that accused led which eventually drove her irresistibly to the commission of the fatal acts, we will review the testimony of witnesses pertaining to the *accused's* habits and character. His commanding officer, other officers who supervised his work and men who worked and were acquainted with him, testified that he was very childish in

his ways, his judgment was not commensurate with his position and rank, and it became necessary to transfer him from job to job because of his inefficiency and incapability for the jobs he was holding (R. 135, 138, 152, 165, 166). At times he appeared to have been drinking heavily the night before (R. 139). Complaints were made against him for failure to pay his debts and for uttering bad checks in the States and in England (R. 144, 147, 149, 152). He seemed to be "a kid that never grew up" (R. 145). The deceased was a habitually heavy drinker and gambler, had a mania for slot machines (R. 89, 143, 149, 153, 168), and, when broke, would borrow to continue playing (R. 150). He was quite obnoxious when drinking (R. 102). While stationed in Arizona, without his wife's knowledge, he depleted their checking account by drawing a check for $409 to pay a gambling debt. One of the sergeants in his organization had $200 in bad checks given to him by the deceased for gambling debts (R. 168).

Mrs. Covert started to complain about her health to her neighbors around Christmas of 1952 (R. 101). She was very nervous and could not sleep and was continuously getting worse (R. 101, 160). When spoken to and during conversations, she would constantly look at the floor (R. 92). She was very much concerned over her children's health and inquired whether the authorities would send her home. When told her husband could not go back with her, she wouldn't go without him (R. 89, 101, 161). They were quiet neighbors, and no one ever heard them argue or fight (R. 161, 166, 167, 174). Outwardly, they appeared to be friendly, calling each other endearing names (R. 97). Accused was considered by her neighbors as a good wife and mother and was highly respected by everyone who knew her (Def. Ex. D, R. 168). Her husband's heavy drinking upset her (R. 89), and she was concerned about again being hospitalized. She worried that something might happen to her children while she was away because her husband got drunk. She considered sending for his parents to go to England to take care of her children (R. 91, 179).

Captain Cogar saw the accused for the first time on 16 February 1953. At that time, he gave her sedatives. She returned on the 19th, but showed no signs of improvement. On these visits, she appeared to be agitated and extremely upset, her pulse and blood pressure were appreciably elevated above normal. She had a definite tremor of her fingers and hands on both occasions. At first he thought her severe nervous upset was probably a hyperthyroid condition. He arranged for her to be admitted to the 5th Hospital Group at Burderop Park for a complete medical evaluation. She was released from the hospital on 3 March when found she had no organic illness and that her entire illness was based on a nervous condition. Captain Cogar again saw accused on March 9 at the

base infirmary at RAF Station, Upper Heyford (R. 236). At that time, "she was even more upset and emotionally disturbed" than on her previous visits. She was not improved to any degree (R. 237). He felt she was becoming rapidly worse and decided she should have psychiatric treatment, including hospitalization as soon as possible. He spent approximately one hour with her. She stated she felt as though "something was going to let go" (R. 238). He contacted Captain Troy (now major), but, due to the fact that no facilities were available at Burderop Park, he gave her sedatives and arranged for her to see Captain Heisler, the psychiatrist.

Captain Heisler, a psychiatrist stationed at the 5th Hospital Group at Burderop Park, England, testified he first saw the accused at about 2 o'clock on 10 March 1953. He interviewed her for about one and one-half hours, more than normal, because
105 of her symptoms of severe anxiety, agitation, and depression. The accused constantly stared at the floor and engaged in no spontaneous activity except chain smoking during the entire interview. She had stated to him that for the past three months she had felt very ill, had no interest in normal activities, had great difficulty sleeping in spite of medication, and possessed a constant vague feeling of uneasiness and anxiety for which she could not account. This latter emotion started sometime after she heard of her aunt's death, and, although at first elated over the news of her inheritance, after a few days she became upset and started to worry about it. She had planned to get their own home and felt the money would "guarantee" her children's education. Her plans centered entirely around her children's welfare. After a few days, she began to feel anxious and worried that perhaps her father might appear and claim the money. Although somewhat assured by the Base Legal Officer that it was not possible to break the will (R. 182, 231), this irrational fear that her father would interfere constantly worried her more and more. She started to develop "a feeling of fullness, a sort of a ball-in-the-throat sensation, which is a characteristic anxiety symptom." The accused felt uncomfortable in crowds and refused invitations; even to small gatherings or to play bingo. All of these things she normally did before (R. 182). She was reliving her childhood over again "particularly in relation to her father"; things she had not been thinking about for a long time. The accused was a very insecure individual, quite emotionally upset, and evidenced "some very—fairly well marked suicidal ideas that she had had for some time past." This was just a week after she had been discharged from the hospital on March 3 (R. 183).

The accused appeared so distressed that Captain Heisler decided to see her again the next day, an unusual practice as he only saw

his out-patients once or twice a week. Captain Cogar was very much concerned about her, and the day before had called Major Troy who informed him that the wards were full, and there was no space available to accept her as a patient. Captain Heisler saw her at the request of Captain Cogar and spoke to accused's husband that afternoon advising him that it was important for the doctor to see her again the next day. The accused had a tremendous amount of difficulty and tended to hold back discussing details of her early life, especially her early relationship with her parents (R. 184). She had been assured after her hospitalization at Burderop that she had no physical ailment. However, the symptoms not only continued, but actually got worse, and
106 primarily the suicidal feelings became more pronounced. There was an increase in her agitation, anxiety, and sleeplessness. She didn't "know where these things come from—sort of vague realization that there was no obvious basis for them, not being able to understand herself why she was so troubled and upset. * * * she had been given a prescription for I think 15 capsules of sodium amytal, 3 grains apiece, which is easily adequate to enable a normal person to sleep for at least eight hours." She had taken four one night and, despite such a heavy dose, awakened relatively early and had a great deal of difficulty sleeping. That was an indication of her extreme agitation and preoccupation (R. 185).

At first Captain Heisler considered hospitalizing her, but due to lack of room in the psychiatric ward and her solicitation for her two small children, he did not. He also considered that there was an appreciable suicidal risk (R. 185); however, besides the lack of space at the hospital, he felt that her husband, being on leave at the time, would be able to exercise a certain amount of caution and supervision and look after her.

At about 5 o'clock the night of the fatal incident (Mar. 10) the accused was visiting her neighbor, Mrs. Scamordella, when her husband came for her. Mrs. Scamordella asked accused to go to bingo with her, and deceased told the accused to go. However, the accused stated she would rather stay home with her husband and watch the television. She invited Mrs. Scamordella to visit her and watch the TV with them (R. 53, 91). The deceased proceeded to bed. There had been no argument, no quarrel, or any other unpleasant incident between the accused and her husband.

Captain Heisler saw her again the next day, March 11, at about 2 o'clock. At that time she appeared quite different from the day before. Her hair was uncombed, she looked somewhat disheveled, and was obviously distressed. Although she had been prompt the day before, she was late on this occasion. When he asked her "How are you? * * * She looked exceedingly depressed and down-

cast and gazed almost constantly at the floor, with no outward show of emotion whatever" (R. 186), answered in "just a completely dull monotone: 'I killed Eddie last night.'" It struck him:

"* * * at the time as so odd in its delivery and so detached from the normal expression of emotion that I had two
107 thoughts immediately: that possibly she had had an acute mental breakdown and that the whole thing was fabricatorily made up, or delusional material of some sort—that is, untrue; or that possibly something had happened. * * *

* * * * *

"* * * she was exceedingly depressed; it was a very profound depression, one in which she exhibited no normal movement, * * * no normal expression, no normal feeling in her voice; constantly stared at the floor; appeared somewhat confused as to the exact sequence of events, of exact times, partially being unaware of the surroundings, * * * she had gone into a psychotic depressive reaction." (R. 187, 188)

When the 31st Article was read to her by Lieutenant Smith, "she was totally incapable of understanding the meaning of this at that time. She was obviously still so detached from normal sence of reality that * * *, she was "certainly incapable of recognizing the importance of the 31st Article being read to her" and incapable of being interviewed (R. 189, 214.

Lieutenant Smith, the Staff Judge Advocate of the Group, read the 31st Article of the Uniform Code of Military Justice to the accused on the afternoon of March 11. He "was of the opinion that such advice was not being comprehended" (R. 232).

The accused had stated to Captain Heisler the afternoon of the 11th that "I guess I hated him like I hated my father" (R. 67, 187). The previous day she had expressed a feeling of hostility towards her father for the rejection she had experienced from him all her life, his cruel treatment of her, and for having abandoned her when she was 12 years of age (R. 187). She had her own sense of guilt because her mother had attributed her father's desertion to her being a girl instead of a boy (R. 190).

It is important to note the parallel of the events and facts in her earlier life and those of her married life. Her husband, like her father, turned out to be a heavy gambler, drinker, and forger and utterer of bad checks, constantly in financial difficulties because of his heavy gambling and drinking. Her father had shown her no love or affection; her husband neglected and did not seem interested in the welfare or future of her two boys. Like her
108 father, her husband showed complete lack of interest in working towards any form of real security. Her father

squandered her mother's inheritance from her first husband, and the accused's husband squandered her savings in gambling losses and heavy drinking. Her father finally deserted them, and her husband had left her and their son because she would not pay off his gambling losses. It was she who was compelled to resume their relationship because she couldn't go on without him. For every incident in her early life an exact parallel is found in her married life with the deceased, "so that in many ways, from a psychological standpoint, the way the patient [accused] felt about her husband shared some of the intense feelings that she had had about her father" (R. 250). There were numerous examples of the type of stress that she was under during her marriage, all of which "is important in only one respect, and that is, it terribly undermined her feeling of security" (R. 191).

These facts and circumstances are not recited to justify the commission of murder, but merely emphasize and explain the extreme anxiety, depression, and emotional upset that was slowly and surely driving this unfortunate woman insane. She was not the type to fight these things back, to argue these matters out, and, although from time to time reluctantly and only when looking for an answer, a cause, or a cure for her depressive feelings, did she talk about her difficulties to her neighbors, she shared this intolerable tormented feeling inwardly. As Captain Cogar testified, although "*she appeared superficially quite calm and under control, it was not difficult to discern within a few moments that she was in a state of severe inner tension and emotional conflict*" (R. 239) (Emphasis supplied). She did not explode. She was a very meek, retiring, calm, quiet person who never argued nor had a fight with her husband. Although her husband was not physically cruel or abusive to her, his heavy drinking, gambling, and irresponsibility, his retiring into a world of his own, paying no attention to his children, ignoring them, rejecting them, as she had been rejected by her father, constituted that mental torture that evenually gave vent and released the pent-up emotional tension that came to a head the night of the fatal act (R. 280).

Captain Heisler best describes this in the following testimony:

> "* * * over a long period the stress was sufficient so that on several occasions she had wanted to leave him, but because of her own dependency needs, which are very strong
> 109 in an individual who has never had normal security, emotional security, she found herself completely unable to leave him, and that of course accounts for the development of a very strong feeling of ambivalence—that is, both of love and of dislike for a loved object, * * *." (R. 195)

This feeling of hate and love is entirely unconscious, and despite her resentment about the way he treated her children, his excessive drinking and gambling, "she was completely unable—not unwilling, but absolutely unable—to voluntarily leave or get out of the situation" (R. 195).

If she had been able to face the reality of the situation she would have done what a normal person under these circumstances would have done, obtained a divorce and left him. With her aunt's bequest of almost $50,000, she could have gone back home with her two children. Many times she expressed a desire to do so. She had tried it once, but became more miserable and suffered more away from him and had to return.

Contrary to the majority's conclusions, the accused was not able to give details of the events of the night of the incident. Major Furst, the Office of Special Investigations agent, who interviewed the accused on the 16th, six days after the incident, testified "she was vague about the actual incidents." The most detailed statement which she made to him was that "He was asleep, and I was ready for bed." When asked if she used an axe, she answered "Yes," but her recollection of the other events was vague. She did not know why she committed the act. However, she was able to discuss her relationship with her husband since their marriage, relating many events, giving dates and places. She further stated he drank and gambled excessively (R. 74, 75), and mentioned his becoming involved in the forging of some checks which she had to make good (R. 76). As to the events leading to her husband's death, she was vague. Nevertheless, she was a very willing witness and volunteered most of the information. Major Furst and the other interviewers felt that the accused was being truthful and was making a full and complete disclosure to them. They were impressed by her sincerity and straightforwardness to the best of her recollection (R. 77).

Captain Heisler testified that the accused did not remember the details of the night of the 10th. A great number of things he asked she was unable to state, and, in spite of extensive
110 interviews, was still unable to recall. She was not sure of the time, but only guessed what it might have been. Many of the incidents she remembered were those events related to her usual habits and not because she specifically remembered them (R. 215). Even to the date of trial, she could not and had difficulty trying to clearly answer some questions put to her.

At the trial, four psychiatrists and a psychologist personally testified, and the testimony of Captain Cogar, an Army medical officer, was obtained by deposition (Def. Ex. I, R. 236, 237). The entire question, legally, as to whether the accused was mentally respon-

sible for the commission of the offense, centers around the testimony of these medical witnesses.

Captain Graves, one of the Sanity Board members, testified that *he was bound by* Air Force Manual 160-42, Psychiatry in Military Law, in his determinations that the accused was, at the time of the commission of the offense, able "to distinguish, right from wrong" and "able to adhere to the right" (R. 242), "with reservations about the premeditation" (R. 243). The acts of the accused were not the result of *irresistible impulse as that term* is defined by paragraph 5c of the Air Force Manual, namely, "'that the accused would have committed the act *even if there had been a policeman at her elbow*'". "* * *" with that definition in mind," he came to the conclusion "that *if a policeman* were present, or someone else were present, she would have refrained from the act" (R. 243) (Emphasis supplied).

Captain Graves further testified "that under this severe emotional stress, her abilities to know right from wrong and to adhere to the right were impaired, but they were not completely abrogated", and again he based this conclusion on the Manual's definition that "*If there had been a policeman there*, for instance, this could not have come about—I mean, she would have been jolted out of it" (R. 251) (Emphasis suplied). However, he did testify that he did not feel that the act was premeditated "the thing was impulsively conceived and impulsively executed, without planning, without thinking" (R. 257). He saw the accused briefly the night of March 13, but did not interview her until the next morning and again "on three or four occasions subsequently for as much as half hour, 45 minutes, or an hour perhaps" (R. 245). Based upon these brief visits and the report of Captain Heisler, who up to that time had interviewed the accused on only two occasions, the 10th and 11th of March, he prepared the first draft of the Sanity Board's report on April 23 (R. 246, 248).

111 Lieutenant Colonel Martin, Chief of Professional Services, 5th Hospital Group and consultant to the Surgeon, United States Air Forces in Europe, a psychiatrist, served as president of the Sanity Board. He spent approximately a total of six to eight hours interviewing the accused with the idea of evaluating her (R. 268). He first saw her on the night of the 11th of March. Although she answered rationally, it was "somewhat automatically, because she was in a rather dazed condition at that time." The next morning, the 12th, the accused asked him why she was there (at the hospital at Burderop Park) and what had happened. "* * *" she repeated the question frequently enough that "I had to tell her what my understanding of the alleged offense was. * * *" It was a normal expression of real anxiety and the wondering what had happened (R. 269). He further testified that he was *bound by the definitions in Air Force Manual 160-42. Based upon the standards*

laid down in that Manual, the act of the accused was not irresistible impulse as defined therein (R. 275). The accused was able to distinguish between right and wrong and "was able to adhere to the right within—but with qualifications" (R. 267). There was "severe impairment of the ability to adhere to the right" (R. 275), but "Sticking strictly to that manual, I must say that she was" mentally responsible in a criminal sense for the act which she committed. On March 10, the night of the commission of the offense, the accused had a malfunction of the mental *function* (R. 276) (see par. 120*b*, MCM, 1951, p. 200).

Although Lieutenant Colonel Martin testified that *sticking strictly to the Manual* he had to say she was legally sane, he testified:

> "I feel quite strongly that the right or wrong did not enter into her thinking at all, did not influence her thinking, her behavior. * * * that part that has to do with right and wrong did not operate sufficiently to make right or wrong—make any difference to her.
>
> * * * * * *
>
> "* * * that the mechanisms were not able to control the unacceptable, the unconscious urges, the unconscious drives." (R. 273)

He reasserted his opinion, expressed in the report of the Sanity Board, that:

> "There is no evidence of premeditation or of prior consideration of the act. It is clear that the decision to perform the alleged offense was hastily arrived at and impulsively carried out, without prior consideration or planning." (R. 274)

112 The Sanity Board in its analysis and evaluation in the Air Force, was bound by the definitions as defined in Air Force Manual 160-42 (R. 275).

Major Troy, the third member of the Sanity Board, testified that *under the standards laid down in Air Force Manual 160-42*, and the definitions therein, the acts committed by the accused on the fatal night were not the result of irresistible impulse and, *if there had been a policeman at her side*, the accused would not have committed the act (R. 278). Major Troy had originally seen the accused the day she was discharged from the hospital at Burderop, on March 3. He next saw her after the unfortunate incident, and spent approximately a total of three to three and a half hours personally interviewing her (R. 279). He testified that:

> "* * * On the night of the offense, this extreme tension and mixed-up feelings, depression, * * * sort of came to a head,

almost overwhelmingly, to the point that she, * * * operated almost in an automatic or dazed manner. I think that her judgment, that her actions of that time, were carried on in this sort of dazed, automatic-like manner; * * *." (R. 280)

Captain Edelsohn, a psychologist, testified that he is chief of the clinical psychology section of the neuropsychiatric service at the 5th Hospital Group; Burderop Park. He has had 16 to 17 years experience in applied field of psychology. Within 36 hours after the fatal act, he began giving the accused a series of psychological tests. He started on Thursday, March 12, for several hours in the afternoon and evening and several days thereafter (R. 287). He gave her all the important standard tests, namely, the Wechsler-Bellevue, Bender-Gestalt, HTP, Mackover, TAT, Cordnell index, Minnesota Multiphasic, and the Rohrschach tests. He subsequently retested her again about April 23. He came to the conclusion as a result of all these tests that the accused's mental responsibility was extremely limited at the time of the commission of the offense, and his diagnosis of the accused's condition was that of paraschizophrenia. This "is considered a psychotic state" (R. 288, 290). He was "convinced that the presence of a policeman would not have resisted her, any more than the United States Army present in the would have resisted her" (R. 290).

113 Captain Heisler had only seen the accused for about one and a half hours on the 10th and about one hour after the fatal incident when he submitted his report to Lieutenant Colonel Martin, president of the Sanity Board. Therefore, his report submitted to and considered by members of the Sanity Board was limited to his observations and examination of the accused on these two occasions (R. 292). However, after his return to the 5th General Hospital at Burderop Park, from temporary duty he again saw the accused on 28 March 1953. That was after the Sanity Board had submitted its report (dated 23 Mar. 53).

During this subsequent period, he spent approximately 40 hours with the accused, and thus learned of other details and incidents about her. As a result of this more extensive and exhaustive examination of the accused, he came to the conclusion "that she had gone into a psychotic depressive reaction" (R. 188, 198, 207, 292), and he didn't think that "if a policeman had been standing near her" "would have made any difference, short of physical restraint. * * * she would not even have noticed the policeman" (R. 207, 208). The accused remained profoundly depressed for some weeks after the act itself. For this primary reason, Captain Heisler started to see her at some length, and on frequent intervals. These symptoms persisted for at least a month. "* * * she was considered sufficiently depressed by I believe all members of the

staff there to the point at which we felt suicide precautions were necessary" (R. 295).

The majority opinion of the Board of Review states that "testimony of the expert witnesses as to the sanity of the accused is in sharp conflict." That may appear to be true because of the rule or standard by which the prosecution witnesses felt they were bound. Captain Heisler, who had spent over 42 hours in interviewing, examining, and studying the accused over a period of several months, and who had spent about one and a half hours with the accused on the same afternoon of the unfortunate incident and immediately the next day thereafter, stated that, in his opinion, the accused suffered a definite mental psychotic condition, unable to distinguish between right and wrong, incapable of adhering to the right, not mentally responsible for her acts, and legally insane (R. 188, 189, 207, 208, 214). Captain Edelsohn, the psychologist, with 16 to 17 years of experience, perhaps the most experienced in the matter of mental diseases than any of the other witnesses, and who had given the accused all the important, standard, recognized tests in such matters, testified that he arrived at the same conclusion. The im-
114 portance and value of these tests and the functions of a psychologist (Edelsohn) were testified to by Major Troy, a prosecution psychiatrist, to the effect that:

> "The clinical psychologist serves in what we often speak of as the psychiatric team, the team usually consisting of the doctor, nurse, psychologist, social worker. Perhaps the best description of the psychologist's role in that team might be equated to that of the *laboratory man*. The psychologist's job is to give primarily—his primary job, let's say, in the psychiatric team, is psychological testing, which is an attempt *to evaluate* an individual through as well objectified tests as possible to make them. That information is added to the individual's record and considered, just as a blood count on [sic] an x-ray—whatever it might be—is considered in making the diagnosis." (R. 283) (Emphasis supplied)

Lieutenant Colonel Martin, Major Troy, and Captain Graves, all members of the Sanity Board, were of the opinion that the accused's mental condition was a dissociative reaction, that based upon the definition, standard, or rule laid down by Air Force Manual 160-42 (policeman at the side test), "with that definition in mind" (R. 243) and "Sticking strictly to that manual" (R. 276), her acts were not the result of irresistible impulse, she could distinguish between right and wrong, adhere to the right, and, although suffering from some severe impairment of the ability to adhere to the right, legally sane and responsible for her acts. However, with the exception of Major Troy, they agreed that the act was not premeditated, was

impulsively conceived, and impulsively executed without planning or thinking (R. 257, 274).

The members of the Sanity Board had made but brief examination of the accused and had not seen her immediately after the commission of the act. Their examinations were for a shorter span of time and on far fewer occasions than Captain Heisler's, who had seen her immediately before and after the incident. They did not have the great many facts that came out in later interviews. Captain Heisler saw her daily after the 23rd of March and continuously attended her (R. 294). The only information he had given the members of the board was a four page report based on his two interviews on the 10th and 11th. The accused remained 115 profoundly depressed for some weeks after the act. That was one of the reasons Captain Heisler saw the accused at some length and at frequent intervals in an attempt to help her over that phase of the depression. That indicated to him that many symptoms actually persisted for some period of time. The neurotic depression, deepening into a psychotic, still persisted even some weeks or even months after the psychotic episode passed off (R. 295). Lieutenant Colonel Martin testified that "actually, during the first week more time spent by the three of discussing this case than there was actually spent by any one of us with the patient, * * *" (R. 271).

We must note that, although Captain Heisler spent approximately forty hours examining the accused, and Captain Edelsohn performed an exhaustive series of tests and subsequently retested her, Lieutenant Colonel Martin spent "approximately 6 to 8 hours of actual interview with the idea of evaluating the patient" (R. 268); Captain Graves only on three or four occasions for periods of a half hour to an hour (R. 246); and Major Troy approximately only three to three and a half hours (R. 279).

The science of psychiatry, like that of medicine, is not a military matter and cannot be controlled by military rules. The science of mental diseases has made great strides in the past decade, and psychiatry since World War II more than ever is recognized in the medical and legal profession as being important and reliable. Despite the mid-Victorian suspicion, bias, and prejudice of some members of the judiciary and the bar, the military included, it is becoming a more reliable and exact science. Every municipality, state and the Federal Government in their hospitals, in the administration of justice, and penal institutions in the civilian and in the military, have come to recognize it more and more. The medical profession as a whole depends upon it.

The evaluation of a mental patient cannot be made by a cursory examination, nor by interviews of three to four hours. A proper diagnosis cannot and should not be attempted unless a great deal of time is spent in constant observation, interviews, and study for

weeks or months, if necessary, and the longer the period, the more accurate the conclusions become (AFM 160-42, par. 20*d*, p. 25, 1953 Ed.). Perhaps facilities did not permit more study of the accused by some members of the sanity board, but surely the
116 accused, charged with so serious a crime as *premeditated murder* for which the *death penalty* could have been adjudged, and where the accused was condemned to imprisonment for her natural life, should have had a more thorough and extensive examination than if she had been charged with a mere absence without leave, disobedience of an order, or petty larceny.

We must also not lose sight of the fact that all the medical witnesses were officers in the United States Air Force on active duty. That is, all are in the employ, as such officers, of the Government. Three of them, Lieutenant Colonel Martin, Major Troy, and Captain Graves were members of the Sanity Board, appointed by the convening authority to look into the question of the accused's sanity prior to trial, pursuant to paragraph 121 of the Manual for Courts-Martial, United States, 1951, and paragraph 19*b*, Air Force Manual 160-42.

Captain Cogar was the medical officer on duty with the United States Army at Upper Heyford Base Infirmary. Captain Heisler was a psychiatrist at the 5th Hospital Group at Burderop Park, England, and Captain Edelsohn was chief of the clinical psychology section of the neuropsychiatric service at the same hospital. Although Edelsohn is not a psychiatrist, he has had sixteen to seventeen years experience in the field of psychiatry. The majority, in their opinion, I do not believe intended to imply that he may have been the least qualified. From practical experience, we know that in some fields, and this is one of them, a psychologist with sixteen or seventeen years experience is a great deal better and more qualified in the field of psychiatry than one who, after graduating from medical school not too many years ago, finds himself within a very short period in the service as a psychiatrist, with never an opportunity to practice his profession on his own responsibility. I believe that Captain Edelsohn, because of his training and many long years of experience and for the amount of time (40 hrs.) he spent with the accused giving her every major test known was as well qualified, and his testimony of as great a weight if not more so than some of the prosecution witnesses. Concededly, all are qualified, some perhaps with more experience than others. None of them were civilian doctors, privately retained by the accused to testify for the defense on her behalf. So there can be no suspicion that their testimony could in any way be colored or biased on behalf of the accused.

117 We, therefore, must conclude that the basis for the opinions of the Government witness who testified that the acts of the accused were not the result of an "irresistible impulse" and

that, therefore, she was able to adhere to the right, were predicated on the definition, which they felt they were bound to follow, contained in Air Force Manual 160-42, namely, the "policeman at the side" test. Thus, the provisions of the Air Force Manual, and particularly paragraphs 5*a* and *c*, becomes of vital importance in the final determination of the question of accused's sanity. This provision in the Manual, dated September 1950, and as a basis upon which the witnesses so testified, provided:

"5. Irresistible Impulse (The 'adhere to the right' Doctrine)

"*a.* If the accused knows that the act is wrong, yet cannot 'adhere to the right' because of some mental disorder, he is *not* (Italicized in original) mentally responsible. This concept recognizes that if a person, because of mental illness, is wholly deprived of the power of choice or of volition, he does not possess the freedom of action essential to criminal responsibility. This presents the medical officer squarely with the thesis of *irresistible impulse.* * * * that the compulsion generated by the illness was so strong that the act would have been committed *even though a policeman had been at the accused's side* at the time the opportunity to commit the offense presented itself. * * *

* * * * * *

"*c.* If the medical officer is satisfied that the accused would *not* (Italicized in original) have committed the act had there been *a civil or military policeman at his elbow, he will not testify* that the act occurred as the result of an 'irresistible impulse'." (Emphasis supplied)

The trial counsel throughout the presentation of the prosecution's case stressed the "policeman at the side" theory and propounded that test in his questions to all prosecution witnesses. That was always the final question upon which he summarized the testimony of his medical witnesses. For example:

118 "Q. Now, in the light of the evaluation you made at the time the board met, in the light of the additional information received by you from Doctor Heisler, and what you have learned since, until the day of this trial; is it your opinion that Mrs. Covert was, on the 10th of March, 1953, mentally responsible in a criminal sense, *as defined by Air Force Manual 160-42?*

"A. Yes.

TC: The prosecution has no further question of this witness.

(Graves, R. 264)

* * * * * *

"Q. *Under the standards laid down in Air Force Manual 160-42*, as you interpret them, is it your opinion, at this moment, that the accused was, at the time of the offense, mentally responsible in a criminal sense for the act which she committed?

"A. *Sticking strictly to that manual, I must say* that she was. I do not know anything about the law further than that manual.

"TC: The prosecution has no further questions. (Martin, R. 275, 276)

* * * * *

"Q. Are you familiar with the provisions and standards laid down of mental responsibility in *Air Force Manual 160-42*?

"A. Pretty well.

"*Under the standards laid down in that manual* and the *definitions therein*, do you consider that at the time she committed the act on 10 March 1953, she did so as the result of an irresistible impulse, as *therein defined*?

"A. No; I do not believe it was an irresistible impulse.

"Q. You believe she would have committed the act had there *been a policeman at her side*?

"A. No; I do not believe she would have.

"TC: The prosecution has no further questions." (Troy, R. 278) (Emphasis supplied)

119 The court took judicial notice of Air Force Manual 160-42 entitled Psychiatry in Military Law, and trial counsel specifically invited the court's attention to "paragraphs 3, 4 and 5, entitled Standard of Mental Responsibility, Knowledge that the Act was Wrong, and Irresistible Impulse in particular" in which the *policeman at the side* theory is contained (R. 285). (Emphasis supplied).

The law officer in his instructions to the court gave them this erroneous, discarded, and obsolete rule to follow in their deliberations:

"* * * An inability to adhere to the right does not exist unless the act is committed under an *irresistible impulse* which completely deprives a person of the power of choice or volition. If the accused would not have committed the act *had there been a military or civil policeman present*, she cannot be said to have acted under an irresistible impulse. * * * " (Emphasis supplied) (R. 331)

The Manual for Courts-Martial, United States, 1951, provides:

"* * * A person is not mentally responsible in a criminal sense for an offense unless he was, at the time, so far free from men-

tal defect, disease, or derangement as to be able concerning the particular act charged both to distinguish right from wrong and *to adhere to the right*. * * * " (par. 120*b*, p. 200) (Emphasis supplied)

Thus the Manual for Courts-Martial provides that in order to be available as a defense, the irresistible impulse must stem from mental disease or derangement.

Lieutenant Colonel Martin, the principal prosecution psychiatrist, and Captain Heisler both testified that the accused, on the night she committed the act, had a *malfunction of the mental faculties* (R. 211, 276), and, therefore, was suffering from a mental defect. Thus, according to these psychiatrists, the accused, at the time of the unfortunate incident was not free from mental defect, but was suffering from a malfunction of the mental faculties.

" * * * The phrase 'mental defect, disease, or derangement' comprehends those *irrational states of mind* which are the result of deterioration, destruction, or *malfunction of* 120 *the mental*, as distinguished from the moral, faculties. To constitute lack of mental responsibility the impairment must not only be the result of mental defect, disease, or derangement but must also completely deprive the accused of his ability to distinguish right from wrong or to adhere to the right as to the act charged. * * * " (MCM, 1951, *supra*) (Emphasis supplied)

Therefore, the important questions for the court to determine in arriving at its conclusion that the accused was legally responsible for her acts are: Was the accused, at the time of the alleged offense so far free from mental defect, disease, or derangement as to be able, concerning the particular acts charged, to distinguish right from wrong, and was the accused at the time of the alleged offense *able to adhere to the right?*

How is the court to determine as to whether the accused was "able to adhere to the right?" If the act was the result of an irresistible impulse, she was not able to adhere to the right. However, if the act was not the result of an irresistible impulse, she could have adhered to the right and was, therefore, legally sane and guilty of the offense charged. So we have the hundreds of pages of testimony boiled down to just that simple question. The test they were urged by trial counsel to follow, stressed by him in his final question to each prosecution witness, urged in his closing argument, and given final approval and acquiesced in by the law officer in his instructions to the members of the court, was:

" * * * If the accused would not have committed the act had there been a *military or civil policeman present*, she *cannot be*

of the accused was not the result of irresistible impulse. Now he says remove the restriction, and he could explain her condition as "irresistible impulse."

130 Captain Graves says that "the members of the Sanity Board were, of necessity, governed in making their decisions by the provisions of Air Force Manual 160-42" and that "It has been difficult" for him and, he assumed, the other members of the Board "to clearly express" their feelings "about this case within the framework of this Air Force Manual" and as a psychiatrist he "*had no choice* but to find this individual sane" (Emphasis supplied).

I do not believe these officers in their affidavits restricted themselves to the Sanity Board proceedings, but did refer to their testimony in court. Lieutenant Colonel Martin stated that:

> "* * * Since there may have been legal technicalities which *prevented my testifying* in detail as to my understanding of the case, I desire at this time to set forth my views in more detail." (Emphasis supplied)

Captain Graves stated in his affidavit that: "I feel that in some essential sense the meaning of the medical testimony as given by myself (and presumably by other members of the Sanity Board)" (referring to Martin and Troy, both of whom also testified in open court) "was not sufficiently clear to the members of the court * * *."

What more could they have said than that their testimony at the trial was not correct, was influenced by an erroneous, discarded theory, and that if not so restricted, their conclusions would have been otherwise?

Neither the prosecution witnesses nor any participant at the trial was aware at the time that a change had been made wherein the "policeman at the side" rule had been changed and was no longer the rule to be followed. The defense was compelled to rely on that standard, not by choice, but because defense counsel was prevented in following any other theory. When he attempted to question Captain Graves as to his personal professional opinion as a medical expert; he was prevented from doing so. The following colloquy occurred during Captain Graves' cross-examination by defense counsel:

> "Q. Now, you made some statement earlier about the rules under the military—you were reaching certain conclusions; what would have been your conclusions Doctor, if you were evaluating this particular patient, with the evidence that
131 was available to you, without the rules that the military laid down?
>
> "TC: I object to the question. It is immaterial what the doctor's opinion would have been in a civilian court. This is

a military court and, as much, [sic] subject to the *rules and standards* laid down for military courts and those *laid down by the Air Force*.

"DC: I must remind the trial counsel and present to the law officer that it has been our contention all throughout the case that we do not have a member of the military on trial, that we have a private citizen of the United States on trial, and that in some respects, with the questions of evidence, we must be subject to the rules of evidence applicable in a federal court." (R. 265) (Emphasis supplied).

Trial counsel countered with the observation that the trial was proceeding "under the rules of the Manual for Courts-Martial, 1951, and *in this particular instance under the rules laid down in Air Force Manual 160-42*." (Emphasis supplied) and that it was immaterial "what the rules are in all the other 48 states" and "in the federal courts." The law officer apparently concurring in this view, sustained the objection of the prosecution (R. 265). Captain Graves was not permitted to express what his professional expert opinion would have been as a result of his long years of schooling, training, and practical experience as a psychologist, but was bound, restricted, and compelled to testify as directed and dictated to him by the definitions and standards set forth by the Air Force Manual 160-42. This very crucial test, upon which hinged the life and liberty of this accused, whether she could distinguish right from wrong and adhere to the right, measured by the so-called "policeman at the side" test, significantly enough had been, at the very date of the trial, abrogated, repealed, discarded, and overruled by the Army and the Air Force and is no longer the definition, the rule, or the standard of the services.

The restraint under which Captain Graves was compelled to testify, not as to his own personal professional opinion but one dictated by the definition and standard laid down by the Manual, is best illustrated by his testimony:

132 "But, *according to the regulations that are set down* for us to determine what is legally insane or what is legally sane, *I have no choice* but to say that this was a neurotic reaction. * * * *and we have no other alternative* but to say that there was enough of her usual self present to know what it was all about at the time it happened and, as I understand *what the board was required to do*, was *to make just that kind of decision;* and in this case I don't think it is an easy decision; * * *." (R. 257) (Emphasis supplied)

It must have bothered their consciences to be compelled to testify and make such a decision contrary to their honest opinion as men

of the medical profession. That compulsion did not make their decision an "easy" one, and they did so because they felt they were "required to do" so and make "that kind of decision" contrary to their understanding and belief. Conscience stricken at the result, they made affidavits of their own volition because of an indignant realization that it was "*a clear cut miscarriage of justice.*" (Emphasis supplied.)

Therefore, the majority are in error when they say:

> "* * * Nevertheless, they [Martin and Graves] testified at length on the general field of psychiatry in its relation to mental responsibility, * * *."

They both testified in court and restated in their affidavits that as far as the crucial question of whether the accused was able to adhere to the right, acted as a result of an irresistible impulse, and, therefore, was legally sane, was based upon the limitation, the restriction placed upon them by the provisions of the Air Force Manual establishing the standard "policeman at the side" rule. The ruling of the law officer prevented Captain Graves from testifying any further in "the general field of psychiatry."

Contrary to the majority opinion, I am convinced that the results of the trial would have been otherwise if the medical experts had been permitted to testify unhampered and unrestricted by a standard which the services, by their action, have disregarded and changed. The change was not made as a mere grammatical correction, but was substantial and does more closely follow the civilian standards. I am further prepared to say that an expert witness of any character, medical or otherwise, if allowed and qualified to testify at all, should be permitted to do so, free
133 to give his professional opinion for whatever it may be worth, unhampered and unrestricted, as long as material and relevant to the issues. If an expert is to be restricted, then he is no longer giving his expert opinion, and the court, in justice and fairness to an accused charged with so serious a crime as premeditated murder, where her very life was at stake, should be and is required to hear, and, yes, be subjected to all the medical, professional, expert testimony the accused could muster on her behalf. The erroneous restrictions thus imposed upon the medical officers, effectively handicapped the court in the determining of the issue of accused's insanity (ACM 1583, Berry [BR], 1 CMR [AF] 607, 611).

It was the intent of Congress that the system of military justice be administered as nearly and as closely as possible so that a man in uniform may be given the same degree of fair play and justice as his brother in civilian clothes, considering the military mission and the maintenance of discipline (see U.S. v. Clay [No. 49],

1 USCMA 74, 1 CMR 74; U. S. v. Gilbertson [No. 318], 1 USCMA 465, 4 CMR 57; U.S. v. Berry [No. 69], 1 USCMA 235, 2 CMR 141; U.S. v. Keith [No. 503], 1 USCMA 493, 4 CMR 85; U.S. v. Ginn [No. 263]; 1 USCMA 453, 4 CMR 45; ACM S-6781, Bruneau, 12 CMR 718.

In the case of Mrs. Covert, a civilian, who became amenable to court-martial only because of having accompanied a member of the military service overseas, we do not have a problem of military discipline. Military courts-martial are bound by the Federal law and rules of practice consistent with the provisions of the Code.

It is a sad commentary on military justice for us to hold that Mrs. Covert, a civilian, is to be adjudged legally sane and responsible for her acts because of an erroneous, unsound, abandoned rule of military psychiatry, while if tried by a civilian court (except for her status as accompanying her husband overseas) would have been adjudged by civilian standards as insane and legally not responsible. That is contrary to the intent of Congress in adopting the Uniform Code of Military Justice.

Air Force Manual 160-42 is not military law, and no one should have been bound by it, but, as far as the witnesses were concerned, it was the law, the standard upon which they had to testify, and they felt bound by it. It was not considered by anyone at the trial as a mere "guide for expert witnesses to aid them in the
134 interpretation of legal standards," but, as the trial counsel so successfully impressed the court and the law officer instructed the members of the court, it was the definition, the yardstick, the standard, the basis, the rule and, to them, the military law which they were intsructed to follow and apply.

It is true that instructions of the law officer are to be read as a whole. However, the final summation of all that he said is laid down in the final test for them to apply and that is, "If the accused would not have committed the act had there been a *military or civil policeman present, she cannot* be said to have acted under *an irresistible impulse.*"

Coupled with all the testimony punctuating this one test, we cannot say that it was not the predicate upon which the findings of the court were bottomed. Although just a single sentence, it was a mighty important one.

Neither the Uniform Code of Military Justice nor the Manual for Courts-Martial prescribes "the policeman at the side" theory as a standard, definition, or test for "irresistible impulse," and, in the absence of any such provisions in these two documents which prescribe what the military law is, the provisions of the Air Force Manual should not have been placed before the court as the military rule, criteria, standard, definition, or law. The expert witnesses

should not have been restricted in their testimony to this theory and to do so was most prejudicial to the substantial rights of the accused. We do not know nor can we speculate what the findings of the court would have been had not this erroneous rule been applied and the medical experts permitted to testify as such, unbridled and unfettered by the restriction placed on their testimony.

The majority opinion contends that there was "no requirement that the court must, or even should, be instructed on the element of mental capacity insofar as the ability to premeditate is concerned, * * *, for the reason that there is no twilight zone between sanity and insanity." They conclude that "An offender is wholly sane or wholly insane." They based their opinion on the cases of Fisher v. United States, 328 U.S. 463, 90 L. ed. 1382, 66 S. Ct. 1318 and Holloway v. United States, 148 F. 2d 665.

135 The United States Court of Military Appeals in United States v. Higgins (No. 3145), 4 USCMA 143, 15 CMR 143, stated that:

> "As part of a general discussion of the problem of amnesia—as distinguished from intoxication—we think it necessary to observe that amnesia, plus *other evidence* (Italicized in original) of mental shortcomings, may require an instruction not only on insanity, but also on the possibility of *partial criminal responsibility*. In other words, we would consider that the existence of mental processes, such as intent or premeditation, necessary for conviction of certain crimes, may be negated by a showing that the accused's mind could not entertain those processes." (Emphasis supplied)

The court noted that they were not unmindful of the United States Supreme Court's ruling in the Fisher case, *supra*, but construed the court's opinion in that case as a construction of the law of the District of Columbia at that time by which the majority felt bound. However, in an early intoxication case (Hopt v. People, 104 U.S. 631, 634, [1882]; 26 L. Ed. 873), the Supreme Court had held it error to refuse an instruction that intoxication might be considered as affecting premeditation in a murder trial. In that opinion the Court had stated:

> "* * * But when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question, whether the accused is in such a condition of mind, by reason of drunkenness *or otherwise*, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury. * * *" (Emphasis supplied)

The Court of Military Appeals further stated in the Higgins case, *supra*, that:

> "In Fisher v. United States, supra, the majority distinguished the prior pronouncement in Hopt by pointing out that it stemmed from a specific statute. Since that statute is closely approximated by the directive provisions of the Manual for Courts-Martial, United States, 1951, paragraph 154*a*(2), 136 no such distinction is available to us. Moreover, if an accused person may lessen his criminal responsibility by a showing that he was not able to entertain premeditation, intent or knowledge due to voluntary intoxication—a condition largely within his own control, * * *—we would regard as anomalous a refusal to permit a showing that premeditation, intent, or knowledge was or might be wanting due to some mental derangement—usually without the accused's control. It would seem to follow that if an accused person produces evidence of an underlying mental state, which might have served to affect his intent at the time of the acts alleged, then the law officer should advise the court that its members may properly consider the evidence of mental condition in determining the accused's capacity to entertain premeditation, intent, or knowledge—when any of these is relevant to an offense charged. * * *"

The Manual for Courts-Martial provides that although voluntary drunkenness not amounting to legal insanity is not an excuse for the commission of a crime, nevertheless "such drunkenness may be considered as affecting mental capacity to entertain a specific intent, or to premeditate a design to kill, when either matter is a necessary element of the offense" (par. 154*a*[2]; U.S. v. Roman [No. 191], 1 USCMA 244, 2 CMR 150; U.S. v. Mitchell [No. 904], 2 USCMA 200, 7 CMR 77).

If we are willing to recognize this reasoning in the case of intoxication, it is just as logical to apply the principle in any situation where for any reason an accused is, in fact, incapable of forming or entertaining the state of mind requisite to the crime charged. And the "otherwise" in the Hopt case has been construed to include the question of insanity.

Paragraph 9*a* of Air Force Manual 160-42 recognizes mental impairment and partial responsibility in the crime of murder:

> "* * * the accused by reason of some mental disorder, might be incapable of the required premeditation, though, capable of having intent to kill or inflict great bodily harm (par. 197, MCM, 1951). Thus, the medical officer does not discharge his full duty when he reports on the sanity of the accused in

said to have acted under an irresistible impulse." (R. 331) (Emphasis supplied)

The "policeman at the side" was the *only* and most important test given to the members of the court as a basis, a standard, a guide, a rule, to follow in their most important decisions as to whether the accused was guilty or not guilty. To my mind it is of the greatest importance and the crux of the whole case. The court was told that such was the military law; the law all witnesses had to follow and were bound by.

Captain Graves was not permitted to express his professional opinion as an expert, derived from his training, study, and practical experience. We, therefore, do not have the unbiased
121 unadulterated honest opinion of a medical expert as to the accused's mental responsibility, but only a picture dictated by the standard laid down by the Air Force Manual. The accused was thus deprived of the fair, impartial trial to which she was entitled under the provisions of the Code Lieutenant Colonel Martin and Major Troy felt they were also bound by that mandate and restriction. The introduction to the manual in its first paragraph contains the following:

"1. General

"This manual defines and explains the *legal standards applied in military law* to determine whether a person was mentally responsible at the time of an offense and has the requisite mental capacity to be tried by court martial. * * * " (AFM 160-42, the same in the 1950 and 1953 issues) (Emphasis supplied)

And the mandate or dictatorial provision of the manual which so impressed the prosecution witnesses that they said "I have no choice", "Sticking strictly" to the manual, is contained in paragraph 5*c* which states:

"* * * he [the medical officer] *will not testify* that the act occurred as the result of an 'irresistible impulse.' * * * " (Emphasis supplied)

And the irony of it all was that they were all wrong. The trial counsel, law officers, and all the medical experts did not know nor were they aware that at the very time of the trial the strict rule of the "policeman at the side" had been changed, repealed, abrogated, discarded by the Armed Forces as unsound, and that, in fact, it was no longer the rule to be followed. Trial was held on the 25th to the 29th day of May 1953.

On 22 May 1953, the provisions of paragraph 5*a* of the Air Force

Manual were revised, and a more lenient, more logical rule was adopted. It now provides as follows:

> "* * * that the compulsion generated by the illness was so strong that the act would have been committed *even though the circumstances were such that the accused could expect to be detected and apprehended forthwith when the offense was committed.* * * * " (Emphasis supplied)

122 It is true that a court-martial is not bound to accept the opinion of one or more of the experts in preference to the opinion of others (ACM 3253, Diamond [BR]; 4 CMR [AF] 370; ACM 5126, McGee, 4 CMR 810; ACM 873, Carras [BR], *supra*; and many others) and is not bound to accept the opinion of experts *if other evidence is more persuasive* (Holloway v. United States, 148 F. 2d 665; United States v. Hill, 62 F. 2d 1022). However, where the evidence upon which the court based its finding was erroneously submitted to them for their consideration, and there was no *other evidence*, not only *more persuasive*, but none at all, it becomes the duty and obligation of the Board of Review to correct that error. It does not become a question of weighing the testimony of one qualified expert against another, but the question is what would their testimony have been, had they been released from the restraint and compulsion to which the prosecution witnesses felt they were compelled to testify because of their blind adherence to a rule which at that time was no longer in force. The neighbors of the accused did testify that she was a calm person, not readily excitable, and one whose only concern was for her home, her children, and her husband, bad as he may have been, but from whom she could not stay away. But, contrary to the conclusions arrived at by the majority, they did also testify as to her nervousness, her complaining of failure to sleep, her constant worry. Mrs. Scamordella testified that "she was just nervous; that was her main cause", "she was upset over her children" and when discussing things, she would not look at her, sort of just talk to her and look to the floor (R. 92). Mrs. Anton testified that the accused became ill at about Christmas time, she had difficulty sleeping and didn't feel well (R. 101) and was quite nervous (R. 102). Mrs. Peel testified the accused complained to her about her health, her nervousness and she couldn't sleep at night. She suggested that the accused go to see a doctor. Accused told her the nervousness was from some kind of thyroid condition, that "she didn't know what she was going to do if she couldn't rest", and "she was getting worse instead of better" (R. 160). Miss Clifton, the kindergarten teacher, saw her the afternoon after the incident. She testified that the accused looked pale, took about five seconds in answering a question put to her, she was staggering, and couldn't find the handle of the

door (R. 164). Mrs. Hartley's testimony was stipulated, that the accused was a rather nervous person, and the condition of the health of her children and her own was a source of worry to her (R. 167).

123 In addition to this testimony, there was evidence of the accused's suicidal tendencies, and that she had, prior to the incident, attempted suicide. The night of the fatal act she took all of the sleeping pills she could find (about 15) and spent the night on a narrow cot in bed with the bloody corpse of her husband. True, the attempts at suicide alone may not be an indication of her insanity, but, considering all these matters and the entire record, one cannot, in good conscious, determine that the accused was not insane. Surely, no normal person, regardless of how hard she might be, would, in her right mind, slip into bed with a horribly mangled and bloody corpse, after having killed him. As Captain Troy, a prosecution witness testified, she "operated almost in an automatic or dazed manner", (R. 280), not knowing what she was doing and unconscious of her surroundings. Those are not the acts of a sane person. This going to bed with her husband after he was dead, established that she was totally devoid of any appreciable sense of reality (R. 208-217, 224, 225).

I have read the cases cited by the majority pertaining to the decisions that the question of insanity is a question of fact for the court to decide. True, but certainly they do not say that the court shall utterly disregard the testimony of medical experts. Some of the decisions indicate still a mid-Victorian suspicion and wariness of psychiatric testimony; that experts do not agree among themselves (neither do lawyers and judges as a matter of fact); and usually testify for the side by which they are hired. Some indicate a distrust for the testimony of experts in mental disease, as unreliable and of little or no value.

Mr. Justice Oliver Wendell Holmes, in a speech at Harvard Law School as far back as 1895, stated:

> "An ideal system of law should draw its postulates and its legislative justification from science. As it is now, we rely upon tradition, or vague sentiment, or the fact that we never thought of any other way of doing things as our only warrant for rules which we enforce with as much confidence as if they embodied revealed wisdom. Who here can give reasons of any different kind for believing that half of the criminal law does not do more harm than good?" (California Law Review, Vol. 37, p. 585)

124 Unfortunately the suspicion and distrust of the science of psychiatry and mental diseases is still strong among us. But again I repeat all the medical experts, including Heisler and Edel-

sohn, were Government employed and Air Force officers, testifying as Government witnesses regardless of which side called them to the stand.

In the instant case, the court evidently did not disregard their testimony, but must have paid a great deal of attention to their conclusions.

Mr. Justice Murphy in his dissenting opinion in Fisher v. United States, 328 U. S. 463, 66 S. Ct. 1318, 1333, 90 L. ed. 1382, stated:

> "* * * When a man's life or liberty is at stake he should be adjudged according to his personal culpability as well as by the objective seriousness of the Crime. * * *"

The fundamental concepts of mental functioning of the human being have completely changed in the last few decades. The consequences of this revolutionary change must be recognized and faced in the interest of individual justice as much as for the effective protection of society. We are most prone to highly value the opinions of psychiatrists when they sustain the sanity of an accused, but ridicule and ignore their opinion when it is favorable on his behalf.

Mr. Justice Cardozo, one of the leading jurists of this country, was very outspoken in his criticism of the legal concept of insanity. In his address before the New York Academy of Medicine in November 1928, stated:

> "'I think the students of the mind should make it clear to the lawmakers that the statute is framed along the lines of a defective and unreal psychology . . .
>
> "More and more we lawyers are awakening to a perception of the truth that what divides and distracts us in the solution of a legal problem is not so much uncertainty about the law as uncertainty about the facts—the facts which generate the law. Let the facts be known as they are and the law will sprout from the seed and turn its branches toward the light . . .
>
> "'. . . [It is my belief that] at a day not far remote the teachings of bio-chemists and behaviorists, of psychiatrists and penologists, will transform our whole system of punishment for crime . . .' (CARDOZO, *What Medicine Can Do For Law* in LAW AND LITERATURE 70, 100, (1931); California Law Review, Vol. 37, p. 576).

125 The court definitely must have felt itself bound by the testimony of the prosecution's medical witnesses and the instructions of the law officer that in the final analysis all the testimony centered upon only one question; that is, could she have adhered to the right? Applying the now defunct rule of "the policeman at the side" theory, they could come to no other conclu-

sion than that she could adhere to the right, the act was not the result of irresistible impulse, and, therefore, she was legally sane, responsible for her act, and guilty of the charge. A conclusion derived from a grossly erroneous theory and certainly most prejudicial to the accused.

In considering the question of insanity of an accused, the Board of Review may make an independent determination of that issue and is not restricted to, but may go beyond, the record of trial in order to obtain and evaluate information which will aid in resolving that question (U. S. v. Burns [No. 847], 2 USCMA 400, 9 CMR 30; CM 349217, Patrick, 7 CMR 278; CM 354045, Puckett, 6 CMR 143).

I do not believe that the issue of insanity was correctly and properly explored at the trial level. In view of the erroneous standard by which the issue was compulsorily presented to the court, we cannot say that this issue was properly and fairly litigated at the trial (U. S. v. Burns, *supra*).

After the results of the trial had been announced, Lieutenant Colonel Martin and Captain Graves, both prosecution witnesses, unsolicited by anyone and on their own volition, made affidavits for consideration by the reviewing authorities. Lieutenant Colonel Martin stated:

> "* * * I believe few people know more about the case than I do, the findings of the General Court-Martial *are completely wrong.* I can only conclude that the court's findings was either reached without consideration of the medical testimony or that the medical testimony presented an inadequate picture. * * *" (Emphasis supplied)

Speaking of Air Force Manual 160-42 (1950 issue), he went on to say:

> "* * * Air Force Manual 160-42 is far too limited in its scope to include all necessary cases in psychiatry and *hindered*
> 126 *the Sanity Board* in reaching a finding that adequately expressed the true condition of Mrs. Covert on the night of 10 March 1953. Her case is one which, in my opinion, most psychiatrist[s] would agree would not fall within the scope of this Manual. The manual *makes it impossible* to explain Mrs. Covert's lack of ability to adhere to the right in regard to the particular offense charged as a irresistable [sic] impulse because of one limitation: we could not say that she would have carried out the act if a *civilian authority* had been there. *If that strong limitation had not been present, her condition could be explained as a irresistable* [sic] *impulse.* * * *

"* * * I believe Mrs. Covert was what I would call 'temporarily insane' on the night of 10 March 1953. * * * The term 'insanity', to me, means that the individual *is not responsible for his or her behavior.* * * * There are a number of mental or emotional reactions not included in Air Force Manual 160-42 which I could classify as a form of insanity from my understanding of the term that would more adequately describe the condition of Mrs. Covert on the night of 10 March without saying that she was psychotic." (Emphasis supplied)

Captain Graves, in his unsolicited affidavit, says as follows:

"* * * the findings of the general court martial *are in error.* I feel that in some essential sense the meaning of the medical testimony as given by myself (and presumably by other members of the Sanity Board) was not sufficiently clear to the members of the court to enable them to reach a verdict consonant with the medical facts in the case.

* * * * * *

"* * * the members of the Sanity Board were, *of necessity, governed in making their decisions* by the provisions of Air Force Manual 160-42. *It has been difficult for me,* and I assume for other members of the Board, to clearly express our feelings about this case *within the framework of this Air Force Manual.* According to the provisions of this Manual, I, as a Psychiatrist, *had no choice* but to find this individual sane. * * *" (Emphasis supplied)

These two out of the three prosecution medical expert witnesses expressly state that they were not permitted, because of the mandate and direction that they shall "*not testify*" unless the rule of "*policeman at the side*" is followed, to testify what their personal professional opinion as experts really was. Captain Graves concludes that the finding of the accused guilty of premeditated murder was "*a clear cut miscarriage of justice.*"

Captain Edelsohn, at the request of defense counsel, submitted an affidavit in which he explained the results and his analysis of each of the tests he performed upon the accused. He stated that:

"* * * Only where there is a major upheaval as in organic brain damage or in psychosis is there a severe perceptical distortion. The distortion found here was severe and clearly of an order which is regularly classed as psychotic."

Several of his tests showed a finding of psychosis in the accused, and he reiterates his former testimony that his diagnosis of the accused was psychosis; specifically, paranoid schizophrenia. He

spent no less than forty hours work upon the accused. "* * * the diagnosis of paranoid schizophrenia takes into consideration more adequately the narciss-tic, seclusive, scizoid, and paranoid features present, which sometimes are more pronounced in testing than in interview."

The Manual for Courts-Martial does provide that:

> "* * * Although the testimony of an expert on mental disorders as to his observations and opinion with respect to the mental condition of the accused *may be given greater weight* than that of a lay witness, a lay witness who is acquainted with the accused and who has observed his behavior may testify as to his observations and may also give such opinion * * *." (par. 122*c*, p. 203) (Emphasis supplied)

However, in the case at bar we have the testimony of medical witnesses alone for, contrary to the interpretation of the
128 majority, the testimony of the lay witnesses (neighbors) did not establish anything to contradict the medical testimony nor to establish that she was not insane. In examining the neighbors at the trial, the question as to her sanity or insanity was not exploited. Nonetheless, many did testify to her nervousness, illness, apprehension, and worry. None of them said that she was perfectly normal and that there never had been anything wrong with the accused. The accused was mentally ill and suffered from December 1952 to the day of the fatal incident, getting progressively worse, had been hospitalized, and was under psychiatric observation and treatment. I cannot understand, in the face of all this testimony, where anyone could find any evidence of normalcy in the accused.

Paragraphs 5*a*, *b*, and *c* of Air Force Manual 160-42 in the 1950 and 1953 editions are substantially the same, practically word for word in most instances, except that the crucial test applied in this case was radically and greatly changed. I do see a very big difference between the test of whether a person would commit an act "with a policeman at his elbow" (par 5*c*, 1950 edition), and whether a person is likely to commit the "act had the circumstances been such that *immediate detection and apprehension was certain*" (par. 5*c*, 1953 edition) (Emphasis supplied). It certainly makes a mighty big difference if a policeman is at one's elbow, physically present in shining armor, ready to restrain you, than if you have to stop, think and consider all the possibilities that if you did commit the crime, you could not expect to get away because you were bound to be immediately detected and apprehended. Physical presence of the policeman requires no thinking nor reasoning it out; you can see him; whereas the risk of immediate detection and apprehension requires some thought, planning, reasoning a matter out,

and stopping to think of the consequences of one's act, i. e., the detection and ultimate apprehension.

Considering the testimony of the three prosecution witnesses, who were compelled, bound to testify as they did because of the restriction placed upon them by the "policeman at the side" theory, the affidavits of Martin and Graves pertaining to their having no choice and that they were not able to properly express themselves as professional men, and the testimony of Captains Heisler and Edelsohn, for the defense, I do not find that the testimony of the psychiatrists is "in diametrical opposition."

129 Martin says, in his affidavit, that the "Manual makes it impossible to explain Mrs. Covert's lack of ability to adhere to the right" and if that strong limitation had not been present he would have testified that "her condition could be explained as a irresistable impulse." Therefore, she was not able to adhere to the right, and, under the rule in the Manual for Courts-Martial, 1951 (par. 120*b*, p. 200), she was not legally responsible for her act. That certainly would have made his testimony agree and not be in "diametrical opposition" to the defense witnesses. It is, therefore, *not* a question of "acceptance and rejection of conflicting testimony."

The court did not err in rejecting or accepting the testimony of one set of witnesses against the other, but was misled by the prosecution's own witnesses who were not permitted to freely and unhampered testify as to their true and honest opinions, by the trial counsel in his trial tactics of pursuing this erroneous and discarded theory, and by the law officer who gave to it the erroneous rule in his instructions for it to follow.

The majority contend that there is considerable diversity of opinion in civilian jurisdictions as to application of this doctrine of irresistible impulse. They should have said there was. I don't believe with the removal of the policeman at the side theory that there may any longer be reason for any such diversity of opinion. As now stated, the theory of irresistible impulse is closer to and conforms with the theory of civilian practice. That rule may have been well-settled in the military prior to 23 May 1953, but that rule was found to be wrong, too strict, and finally abandoned by the military. It no longer exists.

The majority state that they did not find sufficient disagreement in the opinions expressed by Lieutenant Colonel Martin and Captain Graves in their affidavits as against their testimony at the trial. Well, I don't know what more Colonel Martin could have said than that the Sanity Board was "hindered" in reaching its conclusion. "The Manual makes it impossible to explain Mrs. Covert's lack of ability to adhere to the right" and "If that strong limitation had not been present, *her condition could be explained as a irresistable impulse*" (Emphasis supplied). At the trial he said the act

Dr. Martin—also testifying for the Government—indicated that the accused could adhere to the right, although he believed that she was subject to an impairment of ability to do so by reason of the dissociation of her personality at the time of the killing. Her dissociative reaction manifested a long-standing psychoneurotic disorder, and placed her in a twilight area near the borderline of psychosis. On the night of March 10, the question of the right and wrong of an act did not at all influence her behavior, since
151 the unconscious personality had assumed control. Colonel Martin stated that there was no evidence of premeditation or prior consideration by the accused of the slaying before us.

Trial counsel directed the attention of this witness to the definitions of irresistible impulse contained in AFM 160-42, and reminded Dr. Martin that he was bound thereby in his testimony. Martin replied that, under the standards laid down by that Manual, entitled "Psychiatry in Military Law," he had concluded that the accused was mentally responsible in a criminal sense—although he commented to the effect that he knew nothing of the law other than that which was stated in this Manual. In his unsolicited post-trial affidavit submitted to the convening authority, he elucidated this position. There he mentioned that Mrs. Covert's acute dissociative reaction had resulted in

> ". . . . a personality (ego) disorganization that permits the anxiety to overwhelm *and momentarily govern* the total individual and that this occurs with little or no participation on the part of the conscious personality." [Emphasis supplied.]

And he added that:

> ". . . In such cases as these, as is well known, a person may be brought out of an acute state of dissociative reaction by some shock as simple as being slapped in the face. In this connection, I believe that the reaction through which Mrs. Covert went on the night of 10 March was such that the appearance of *a civil authority* at her side would have been equivalent to the slap in the face and that she probably would not have carried out the alleged act. *The same probably would have been true if her children would have come into the room.* But none of these things happened and she remained in a dissociated state until she had taken the sedatives and fallen to sleep." [Emphasis supplied.]

Major Troy's conclusion was that the accused was mentally responsible within the standards laid down in AFM 160-42, and that

she would not have committed the act had there been a policeman at her side. Elaborating his views, he testified:

". . . On the night of the offense, this extreme tension and mixed-up feelings, depression, I feel, sort of came to a head, almost overwhelmingly, to the point that she, as many
152 normal people feel in a shock, of a severe stress, that she worked—that she operated almost in an automatic or dazed manner. I think that her judgment, that her actions of that time, were carried on in this sort of dazed, automatic-like manner; that the ambivalence, the mixed feelings, the depression; that she wanted to give her children something, that her own life was, she felt, ruined; that she had nothing to gain; and that her husband stood in the way of anything she might give her children—she expressed the idea that she might take her own life, but if she did that the money—the children would fall heir to the husband, and that they again would be in the same boat.

"So I feel that it was in this dazed, impaired perhaps, state of mind that the offense was committed."

At one point Dr. Troy stressed the notion that it was possible for psychiatrists reasonably to disagree in diagnosis. And he appears to have been in disagreement with his colleagues respecting Mrs. Covert's capacity to premeditate the homicide, since he was the only expert witness who stated that she *could* premeditate. Interestingly enough, Major Troy had probably enjoyed less opportunity to observe the accused than the other medical witnesses who testified, but was the only one of the group who had been certified by the American Board of Neurology and Psychiatry—although all appear to have been well-versed in their profession.

In their arguments, counsel for both Government and defense noted that all expert witnesses had indicated that they felt bound by the provisions of AFM 160-42. However, defense counsel insisted that, aside from the restrictions of the Manual, they had agreed that Mrs. Covert was irresponsible—but he went on to urge that, even *within* those limitations, the members of the court were required to hold her to have acted without mental responsibility.

The law officer, in instructing the court-martial stated: "If the accused would not have committed the act had there been a military or civil policeman present, she cannot be said to have acted under an irresistible impulse." He neglected, however, to instruct the court specifically with respect to the possible effect of the psychiatric testimony on the issue of Mrs. Covert's premeditation.

153 Treating first the two certified questions, we observe that United States v. Kunak, 5 USCMA 346, 17 CMR 346, pro-

vides a complete answer to both. There we reversed a conviction for premeditated murder and returned the cause to The Judge Advocate General of the Army for reference to a board of review. We stated:

> "'This brings us to an error which we conclude is fatal to the findings and sentence on premeditated murder. It involves the question of whether the law officer erred in failing to instruct the court-martial members that they might consider the mental deficiency of accused—short of insanity in the legal sense—in determining his capacity to premeditate. We have on several occasions mentioned the necessity of covering that issue by an appropriate instruction if it is raised reasonably by the evidence. One can hardly contend in this case that there was no substantial evidence of mental deficiency which might interfere with those mental processes. The instruction on premeditation is sketchy and while the one defining insanity informed the members of the court-martial that they could not convict the accused of the crime charged if there was a reasonable doubt about his mental responsibility, it is deficient, for the purpose under consideration, in that it was tied up to legal insanity which would exculpate the accused of the offense charged and all included offenses. The law officer nowhere suggested the important principle that mental impairment, less than legal insanity, might be considered by the court-martial members when they were deliberating upon the element of premeditation. Significantly, missing in this case is an instruction to the effect that if in the light of all evidence the court-martial has a reasonable doubt that the accused was mentally capable of entertaining the premeditated design to kill involved in the offense of premeditated murder it could find the accused not guilty of that degree of the crime."

IV

We cannot accept the accused's claim that the evidence is insufficient to sustain her conviction. We are sure that our statement of the Government's evidence on the issue indicates that the members of the court could reasonably have reached a conclusion that the accused was mentally responsible. While we believe that certain of the psychiatrist witnesses predicated their conclusion of responsibility on an incorrect interpretation of AFM 160-42—as we shall develop later—we do not consider that this phenomenon warrants dismissal of the charges for insufficiency.

154 Moreover, the presumption of sanity must be taken into account. Certainly in this case—and probably in almost any other—that presumption will be sufficient to shield a finding of guilty from a holding that, *as a matter of law*, the accused was

mentally irresponsible. Of course, the presumption would not serve to preclude a board of review, or other reviewing authority with general fact-finding power, from weighing the evidence for the purpose of determining whether, *as a matter of fact*, the charges should be dismissed, or returned for a rehearing. In this connection, the following comments from United States v. Biesak, 3 USCMA 714, 14 CMR 132, seem apposite:

> "Such reasoning has been utilized in dealing with the presumption of sanity. The Massachusetts court—among others—has indicated that, although the presumption of sanity may vanish, 'the fact that a great majority of men are sane and the probability that any particular man is sane may be deemed by a jury to outweigh in evidential value testimony that he (the accused) is insane.' Commonwealth v. Clark, 292 Mass. 409, 198 NE 641. See also Commonwealth v. Cox, 327 Mass. 609, 100 NE 2d 14. Cf. People v. Chamberlain, 7 Cal. 2d 257, 60 P. 2d 299. The court added—properly and cautiously—that it is not 'the presumption of sanity that may be weighed as evidence, but rather the rational probability on which the presumption rests.' Our decision in United States v. Burns, supra, reaches the same result, although the point was not then expressly considered by us. In that case the Government relied solely on the 'presumption of sanity,' but the defense offered psychiatric testimony that the accused was insane. Upon review we ordered a rehearing for failure of the law officer to instruct the court concerning insanity, which had been raised by the evidence. We did not, however, dismiss the charges, which would seem to have been called for if the 'presumption of sanity'—or, at least, the rational probability which is the core of that presumption—were insufficient to sustain a finding that the accused was sane."

V.

Moving to the appellant's second point, we observe that the terms of AFM 160-42 are identical with those of TM 8-240, which has been before us recently in two cases. United States v. Kunak, supra; United States v. Smith, 5 USCMA 314, 17 CMR 314. Indeed, TM 8-240 and AFM 160-42 were promulgated jointly by the Departments of the Army and the Air Force—with the result that we deem applicable to the latter publication the remark of the majority of this Court in United States v. Smith, supra:

> 155 ". . . However, we have never held—or believed—that the Technical Manual in question was of itself in any way binding on this Court, nor intended to be controlling on either a court-martial or an expert witness."

general. He must be prepared to say whether the de-
137 fendant's mental state was such that he was capable of having the degree of intent, wilfulness, malice, or premeditation which the law requires for determination of guilt or for a certain degree of guilt."

The Manual for Courts-Martial, 1951, provides that:

"A murder is not premeditated unless the thought of taking life was *consciously conceived* and the act or omission by which it was taken *was intended* * * *." (par. 197d, p. 352)

(Emphasis supplied)

Lieutenant Colonel Martin and Captain Graves, both prosecution witnesses, testified that there was no evidence of premeditation, reiterated this conclusion in their affidavits, and the Sanity Board likewise found none (R. 243, 257, 274). Captain Heisler and Captain Edelsohn, for the defense, testified to the same conclusion (R. 214, 288).

Ordinarily, a person is not punished criminally unless he did the act with some wrongful state of mind. This fundamental principle of criminal justice is at least as old as Christian ethics—if the mental state requisite to a given crime is absent, the crime has not been committed. To what cause the absence of such mental state is to be attributed would seem immaterial (Hall, Principles of Criminal Law 143-7 [1947]; Sayre, The Present Signification of Men's Rea in the Criminal Law, Harvard Legal Essays 399, 401 [1934]).

The law officer failed to instruct the court as to the effect that accused's mental state might have had on her ability to premeditate. The issue of mental impairment having been fairly raised by the evidence, such instructions should have been given whether or not any request for such instructions had been made (U.S. v. Burns, *supra;* U.S. v. Larry [No. 1896], 2 USCMA 415, 9 CMR 45; U.S. v. Niolu [No. 1040], 2 USCMA 513, 10 CMR 11; ACM S-5536, Hankins, 10 CMR 830; ACM S-5903, Gillespie, 11 CMR 718; CM 360874, Murphy, 9 CMR 473).

Failure of the law officer to instruct the court that if they found accused's reason so far impaired that she was unable to premeditate, they could not find her guilty of premeditated murder, was reversible error.

138 In all murder cases, the first thing one usually looks for is the motive. That very often is the most important piece of evidence which establishes the intent to kill, why the crime was committed.

We do not have here a Ruth Snyder-Judd Gray triangle. No question of another woman or man is involved. Jealousy was not the motive. There was no design on the part of the accused to get

rid of her husband to collect his insurance, no cause for revenge because of brutal beatings, nor was this act committed in the heat of passion, after an argument, struggle, or fight.

In spite of his shortcomings, she loved her husband, could not stay away from him; tried it once, became miserable, and had to go back. She had the prospect of getting a large sum of money of her own which would have assured for herself and her children a comfortable life away from her husband. No, we do not have any of the usual reasons for the commission of homicide.

Why did she kill him? Was she the brutal, mean, cruel, hard, criminal type of a woman to whom a life is of no value? No, on the contrary, she was a quiet, calm, meek, motherly type of a woman, well-liked, and respected by all who knew her.

But, she was sick, mentally sick, getting progressively worse, until the pent-up tension "came to a head" and, without deliberation or consciously knowing what she was doing, she "killed Eddie." I cannot, from all the evidence in this case, in good conscience, agree that this unfortunate sick woman is guilty of premeditated murder of her husband whom she dearly loved.

At the time of the commission of the act, the accused was pregnant (R. 124, 277). (The child was born during her incarceration on 7 Dec. 53).

The accused was not mentally responsible for her act, was legally insane at the time of the commission of the act, and the findings of the court were contrary to the weight of the competent evidence. The errors, in limiting the medical witnesses from testifying as to their professional expert opinions; the restrictions placed upon their testimony by an erroneous, abandoned, discarded theory of law (policeman at the side); and that incorrect theory having been erroneously submitted to the court for their
139 consideration by the law officer, all are of such magnitude as to require a reversal of the findings of guilty. The findings of guilty and the sentence should be set aside and the charge dismissed.

ALEX PISCIOTTA.

140 EXHIBIT "F" TO RETURN AND ANSWER ORDER

UNITED STATES OF AMERICA, ss:

The Honorable, The Judges of the United States Court of Military Appeals

To The Judge Advocate General, United States Air Force:

GREETING:

WHEREAS, lately in a general court-martial of the United States Air Force in a case between the United States and

Clarice B. Covert, a person accompanying the Armed Forces of the United States without the continental limits of the United States and its possessions, in which the accused was found guily of violations of the Uniform Code of Military Justice and sentenced to life imprisonment, and said sentence was approved by the convening authority, and said sentence was affirmed by the Board of Review as by the inspection of the record of trial which was brought into the United States Court of Military Appeals by virtue of a certificate for review and a petition for grant of review, agreeably to the Uniform Code of Military Justice in such case made and provided, fuily and at large appears; and

WHEREAS, on the fourth day of November, in the year of our Lord one thousand nine hundred and fifty-four, the said case came on to be heard before the said Court on the said record of trial which was brought into the United States Court taken under advisement by said Court:

ON CONSIDERATION WHEREOF, it is now ordered by this Court that the decision of the said Board of Review in this case be, and the same is hereby, reversed for the reasons set forth in the following opinion:

141 AND IT IS FURTHER ORDERED, That this case be, and the same is hereby, remanded to The Judge Advocate General of the United States Air Force, for proceedings not inconsistent with the opinion above. You, therefore, are hereby advised that such proceedings be had in said case as will cause the convening authority to order a rehearing, if such rehearing is practicable; and, such other and further proceedings as according to right and justice and the Uniform Code of Military Justice ought to be had, the said decision of the Board of Review notwithstanding.

WITNESS, the Honorable Clerk of the United States Court of Military Appeals, the sixth day of July, in the year of our Lord one thousand nine hundred and fifty-five.

ALFRED ————

Clerk of the United States Court of Military Appeals.

No. 4974

UNITED STATES, APPELLEE

v.

CLARICE B. COVERT (A PERSON ACCOMPANYING THE ARMED FORCES OF THE UNITED STATES WITHOUT THE CONTINENTAL LIMITS OF THE UNITED STATES AND ITS POSSESSIONS), APPELLANT

On Certification from The Judge Advocate General of the U. S. Air Force and on Petition of the Accused Below [1]

Frederick Bernays Wiener, Esq. and Col. A. W. Tolen, USAF, for Appellant.

Lt. Col. Emanuel Lewis, USAF, Lt. Col. Harold Anderson, USAF, Maj. William G. Carrow, III, USAF, and Capt. Giles J. McCarthy, USAF, for Appellee.

OPINION OF THE COURT—Decided June 24, 1955

PAUL W. BROSMAN, Judge:

This case involves a further problem of mental responsibility. The accused woman was tried in England by general court-martial for the premeditated murder of her husband, in violation of the Uniform Code of Military Justice, Article 118, 50 USC § 712. She was found guilty under the charge and its specification and sentenced to life imprisonment. The convening authority approved both the findings and sentence—and a board of review in the office of The Judge Advocate General, United States Air Force,
143 with one member dissenting, has affirmed. The case is before us on both the accused's petition for review and a certificate from The Judge Advocate General. The questions certified are as follows:

"a. Upon the state of the evidence in this case bearing upon the issue of sanity, was the Law Officer under a duty to provide the court-martial with further specific instruction as to the possible effect of such evidence upon the mental capacity of the accused to entertain premeditation?

"b. If the answer to the preceding question is in the affirmative, may the error be purged by affirming so much of the approved findings as find the accused guilty of unpremeditated murder and thereafter reconsidering the approved sentence?"

[1] ACM 7031.

The grant of review by the Court authorized argument on the following points, which we phrase generally:

(1) Is the evidence legally sufficient to establish, beyond a reasonable doubt, that the accused was mentally responsible for the crime charged?

(2) Did the limitations on certain expert witnesses testifying on irresistible impulse, which are provided in AFM 160-42, constitute an instance of improper command influence?

(3) Did the law officer err in restricting defense counsel in his cross-examination of the Government's expert witnesses?

(4) Did the law officer err in instructing that the "policeman-at-the-elbow test" was a proper method for determining whether the accused was impelled to commit the crime by an irresistible impulse?

II

We accept defense counsel's concession that no question respecting the cause or agency of death is involved in the present appeal. It is properly admitted by them that the evidence against the accused on this issue is undisputed—and because of this no more than a brief summary of the facts and circumstances immediately surrounding the homicide will be related. On March 11, 1953, during an interview with Mrs. Covert, Captain Ivan C. Heisler, a psychiatrist of the 5th Hospital Group, obtained information which caused him to believe that during the previous night a killing had occurred at the quarters occupied by her husband and his family. Acting on this knowledge, he obtained a key to
144 her and her husband's home and—after leaving his patient in the care of a nurse—went to their quarters, accompanied by the base surgeon, and an air police officer. On arrival, they proceeded to the upstairs bedrooms, and saw in one of them a cot on which a number of blankets had been arranged. After removing these, they discovered the dead body of the deceased, the accused's husband. A pillow covered his head, and there was much blood on the bed clothing. It was quite obvious that he had been dead for some time, and a subsequent examination revealed that death had been caused by blows on his head and face which had been inflicted by a blunt instrument. A hand ax, which was shown later to bear stains of human blood, was found near the fireplace in the first floor front room of the quarters, and a suit of bloodstained pajamas was subsequently located hidden in a laundry tub on the premises. In pretrial statements, made by the accused to various Air Force medical and investigative people, she admitted that she had committed the offense charged sometime during the night of March 10-11, 1953.

The evidence presented with respect to the accused's mental responsibility was extensive, and included her life history and a detailed psychiatric exposition of her mental condition at the time of the homicide. According to this account, the accused had been born prematurely in Augusta, Georgia, on December 21, 1920, as a child of her mother's second marriage. Her childhood was unhappy, and was marred by frequent quarrels between her parents and by cruel treatment directed by the father against both herself and her mother. She felt unwanted, alone, afraid, without parental love. The accused was reclusive during high school days and markedly hesitant to invite friends to her home—which she described as a dirty, broken down three-bedroom house next door to a chicken yard and an alley. Her father she remembered as coldly indifferent, and so resentful of the fact that she had not been born a boy that—according to her mother's account—he had on one occasion gone so far as to attempt to toss her out of a window, and on another to choke her. In 1926 her father left their home, but subsequently returned. However, in 1932 he abandoned his family permanently. His distaste for the accused appears to have been characterized by the frequent presentation to her of gifts and toys designed for boys, and he was plagued by incessant financial difficulties occasioned by gambling.

After completing high school, the accused unwillingly left her home to begin nurses' training, since she continued to feel unwanted there. After meeting the deceased—then an infantry second lieutenant—in January 1943, she married him in March of the same year. Between May 1943, when he departed for overseas duty, and November 1945, when he returned to the United States, her husband was frequently in financial trouble—and at one time she was required to find $600.00 to free him from custody. On resuming civilian life, he became an unqualified wastrel, took to drink, and spent most of his wife's accumulated savings of more than $5000.00 before re-entering the military establishment in 1946 as an Air Force master sergeant.

New financial problems ensued, and by November 11, 1947, when the pair's first child was born, their savings had been exhausted—and an insurance policy had been converted to take care of necessary medical expenses and hospitalization. During the accused's pregnancy, Sergeant Covert had covered a $450.00 gambling loss with a worthless check. Conduct of this nature led to a separation—but the accused became nervous, sleepless, and less able to perform her daily tasks. A reconciliation was followed by the birth of a second child in September 1950.

In May 1951 the deceased was assigned to duty in England with the Seventh Air Division—and, after his wife's arrival four months later, they resided in London until July 1952. The destruction by

fire of certain goods of hers which had been stored in the United States, the poor health of her younger son and his delay in learning to speak—together with the Sergeant's continued gambling—all served to keep the accused on tenterhooks. In December 1952, after the couple had been transferred to Upper Heyford, Eng-
146 land, the accused was informed that she was about to inherit a sizeable sum of money—glad tidings from which, unfortunately, her present tragic situation later developed. The accused's preference for saving this windfall for their children's education and future welfare clashed sharply with her husband's desire to acquire a new automobile and tour the European continent —a difference of opinion which brought further worry to the accused. Indeed, she began to feel incapable of continuing her harassed life—especially as a possibility remained that she would be deprived entirely of the prospective legacy by the reappearance of her long missing father, who might have been able to establish a claim to the fund superior to her own.

After, as well as before, the arrival of news concerning her probable inheritance, Sergeant Covert continued to display what appears to have been his established pattern of questionable conduct—which, as numerous witnesses portrayed it, involved poor judgment, childishness, gambling, financial irresponsibility, and—on at least one occasion—the public humiliation of his wife. Indeed, in many unpleasant ways he displayed ever-greater similarity to the accused's vanished father. As identification of husband and father grew, the accused's depression increased. Having sought aid from a military medical facility, she was directed to consult with a Captain Cogar, an Army physician, who, on February 16, 1953—the date of her first visit—prescribed a mild sedative, and advised her to revisit him after three days. No indication of improvement was observed on her return—and, in view of a possible hypothyroid condition, she was referred to a hospital for a complete physical examination. However, hospitalization revealed no organic difficulty, and she was discharged, after having been furnished with a supply of sleeping tablets. On March 9, when Dr. Cogar next saw the accused, she appeared emotionally disturbed, and stated that she felt as though "something were about to let go," and that "if
147 she did not obtain relief from her nervous condition she was afraid something serious might happen." Concluding that the accused was thoroughly upset, Cogar again prescribed sedation, and arranged for her an appointment with Captain Heisler, a psychiatrist stationed nearby.

This medical officer talked with her on the afternoon of March 10, 1953, for approximately one and one-half hours—a somewhat longer engagement than is normal for such a purpose, but one occasioned by the accused's obvious distress and agitation. Staring almost

constantly at the floor, Mrs. Covert engaged in no spontaneous activity, save that she chain-smoked cigarettes. She related her symptoms, her anxiety feelings and sleeplessness, as well as other matters which had caused her mental disturbance over the years. Heisler considered immediate hospitalization, but decided against such a disposition at the time in view of crowded infirmary conditions, limited medical facilities, and what he then deemed an absence of urgency.

Also on March 10, the accused visited the home of a friend and neighbor, a Mrs. Scamordella, and at the time appeared normal and neither upset nor nervous—even remarking that she felt "pretty good." Mrs. Scamordella invited her to accompany the former to a bingo game that evening, but the invitation was declined. Shortly before 6:00 p. m., Sergeant Covert and the two children appeared at the Scamordella home, and soon thereafter the entire family returned to their own quarters—with the accused and her husband seeming to be in a happy mood and on good terms. After the evening meal at the Covert residence, the husband retired at his usual hour, apparently without argument between the two or other untoward episode. He did not rise again, for while he lay sleeping, Mrs. Covert killed him with an undetermined number of ax blows. At the time she was clad in flannel pajamas which—being covered with blood—she placed in a washtub. In her testimony at the trial, the accused displayed a loss of detailed recollection regarding the events which transpired that evening, and could offer no reason for her act. After the homicide she covered the body, administered to herself a heavy dosage of drugs, and thereafter composed
148 herself for sleep in the bed occupied by her dead husband—apparently with no expectation that she herself would ever awaken from slumber.

Between 1:30 and 2:00 p. m. the following day, Mrs. Covert and her children were seen walking across the lawn toward a nursery, where she left the children. She appeared pale, seemed to stagger, and experienced difficulty in locating the knob on the nursery door. Later she departed from her home for a two o'clock appointment with Captain Heisler. She wore slacks and a leather jacket; her hair was uncombed; she was otherwise dishevelled and seemed obviously distressed. Arriving late for the medical appointment, she responded to the psychiatrist's question concerning the state of her health by commenting that it was "not so good"—and thereafter, with no sort of preface, stated in an unemotional and dull monotone, "I killed Eddie last night." After this and later remarks had precipitated the discovery of the Sergeant's body, Mrs. Covert was confined to the infirmary for the greater part of the afternoon and was interrogated to a limited extent.

Considering her condition as he observed it on March 11, 1953—

together with information obtained from the previous day's interview and subsequently acquired data—the Captain concluded that the accused suffered from a psychotic depressive reaction at the time of the slaying. In short, he believed her to be a psychotic person who was unable to distinguish right from wrong, and to adhere to the right, at the time of the act charged. Among other factors, his opinion was fortified, he felt, by the comment of Mrs. Covert—an unreconstructed Southerner—to the effect that even the presence of General Sherman would not have prevented her from killing her spouse. This expert witness believed that, under any and all tests, including that presented by AFM 160-42, the accused was wholly irresponsible.

Relying on tests performed on the accused by him after the offense, one Captain Edelsohn, a clinical psychologist, supported Heisler's views. Edelsohn was reluctant to confine himself to what he described as the "black and white field" of psychia-
149 try—since he preferred a more flexible approach to diagnosis —but he did consider that, at the time of the killing, Mrs. Covert suffered from a paraschizophrenic condition, and was a totally irresponsible psychotic whom neither policemen, nor the entire United States Army, would have deterred from the homicide. He termed "ridiculous" the findings of a sanity board consisting of three psychiatrists, Lieutenant Colonel Richard L. Martin, Captain James H. Graves, and Major Richard E. Troy.

Captain Graves had been the original draftsman of the sanity board's report, although it had been rewritten extensively. In his opinion, Mrs. Covert on the night of the killing had suffered from a dissociative reaction, but this had not, in his opinion, reached psychotic proportions. However, as he pointed out: "In the case of Mrs. Covert, I think we can state very securely that she is not a character and behavior disorder." In further clarification of dissociative reaction he noted:

> ". . . there is in psychiatry, and in the official nomenclature which we use—we have to use, in military psychiatry, which we practice—there is a designation which we would use for this sort of thing, which we call a disassociative reaction. It is a big word, but it just means, for a temporary period of time the personality is not functioning as a whole. The whole personality is not working."

With reference to the accused's ability to adhere to the right, the following colloquy occurred during direct examination of Captain Graves by trial counsel:

> "Q. Do you feel that if a policeman were present, *or someone else were present*, she would have refrained from the act.
> "A. Yes, I do." [Emphasis supplied.]

The passages from Captain Graves' testimony set out below are also pertinent to his approach to the "policeman at the elbow" test:

". . . If there had been a policeman there, for instance, this could not have come about—I mean, she would have been jolted out of it. *If her children would have been there, I am sure she would have been jolted out of it.*

. . . . . .

150 "After the crime, of course, she was in a sort of—she was in a depressive state, which would go along with being in the very difficult straits in which she found herself, but there has been no really fundamental change in her personality at the time of the crime or after. There was, in my opinion, a temporary weakening of the power of her conscience, a weakening of her power to adhere to right and to know right from wrong and to act upon it, but it was not abrogated; it was not thrown aside completely; it was not completely inundated, let's say. She still possessed the capacity to adhere to the right and to know right from wrong, and if there had been some disturbing influence, like someone walking into the room or the children waking up, or something like that, that occurred at this time, I think that this disassociation that I speak about would not have produced the crime for which she is being tried." [Emphasis supplied.]

Captain Graves emphasized with respect to Mrs. Covert's condition:

"*But, according to the regulations that are set down for us* . . ., I have no choice but to say that this was a neurotic reaction. There was nothing psychotic about it, in my opinion, it was a temporary, partial brushing aside of the conscience. The personality was not disintegrated." [Emphasis supplied.]

However, it appears—according to Dr. Graves—that there were powerful emotional forces operating on Mrs. Covert which rendered her incapable of conceiving of and executing the crime in a premeditated way. The idea of the offense came to her in a flash, and was as rapidly executed. Therefore, this witness expressed to the court-martial definite doubt that the killing was premeditated. In his view, Mrs. Covert

". . . felt very futile about the whole business, and she, I think, had formed some intent of suicide and the question of what might be done to her in this disassociative state I don't think was very strong in her mind. I just don't think that she was capable of thinking of it, you see.

United States, 1951, has the same provision. In paragraph 120*b*, I find the following:

> " . . . To constitute lack of mental responsibility the impairment must not only be the result of mental defect, disease, or derangement but must also completely deprive the accused of his ability to distinguish right from wrong or to adhere to the right as to the act charged. Thus a mere defect of character, will power, or behavior, as manifested by one or more offenses, ungovernable passion, or otherwise, does not necessarily indicate insanity, even though it may demonstrate a diminution or impairment in ability to adhere to the right in respect to the act charged. Similarly, mental disease, as such, does not always amount to mental irresponsibility."

In United States v. Smith, supra, Judge Brosman, speaking for the majority, had this to say about that provision:

> "The Manual for Courts-Martial emphasizes that 'to constitute lack of mental responsibility the impairment must not only be the result of mental defect, disease, or derangement but must also *completely* deprive the accused of his ability to distinguish right from wrong or to adhere to the right as to the act charged.' Paragraph 120*b*. (Emphasis supplied.) Thus, mere *impairment* of the ability to adhere to the right does not constitute a defense, although it may form a mitigating circumstance. Paragraphs 120, 123. The emphasis on *complete* inability to adhere to the right renders it difficult to deem mentally irresponsible an accused person who would not have performed the act had there been an appreciable likelihood that he would be arrested and punished."

Even though that principle may, in the words of the psychiatrists, be too narrow and restrictive, I believe we have placed our approval on it and I have no desire to retreat. That concept, of course, narrows the area in which medical experts may operate, contrary to the wishes of some of them, but it furnishes a satisfactory reed for the experts and the Courts to lean upon.

170 Finally, in United States v. Smith, supra, a majority of this Court reached the conclusion that the provisions embracing the policeman at the elbow test and the fear of detection test, while differing somewhat in wording, possessed an identical core of meaning. If we could so conclude from our understanding and knowledge of the principles of psychiatry, I am willing to concede the experts who testified in this instance had the perspicacity to reach a similar conclusion long before this case was tried. If I must choose on the basis of this record, I would conclude that any

claimed misapplication of principles is imagined at this level. For the foregoing reasons, I would answer the questions of The Judge Advocate General of the Air Force and dispose of the assignments of error by reversing the finding of premeditation, affirm a finding of unpremeditated murder and return the case to the board of review for reconsideration of the sentence.

171 EXHIBIT "G" TO RETURN AND ANSWER

Maj. Duree/pm/74639/Wrtn. 8 Jul. 55
Office of The Judge Advocate General

11 Jul. 1955

SUBJECT: Decision of the United States Court of Military Appeals in the case of Clarice B. Covert (A person accompanying the Armed Forces of the United States without the continental limits of the United States and its possessions).

To: Commander, Headquarters Command, USAF. Attn: Staff Judge Advocate, Bolling Air Force Base, Washington 25, D. C.

1. Appellate review in the case of the person named above has been completed. Your attention is invited to the inclosed copy of the preliminary court-martial order and two copies of the decision of the United States Court of Military Appeals, together with the receipt for accused's signature. You are requested to serve the copy of said decision which bears the notation "Accused's Copy" and a copy of this letter upon the accused, and to obtain her receipt in duplicate on the forms inclosed for this purpose. It is requested that you return by indorsement to this letter such receipt or, upon her refusal to sign same, a certificate of service upon her.

2. Under the provisions of Uniform Code of Military Justice, Article 67(f) and the Manual for Courts-Martial, United States, 1951, paragraph 101, and in accordance with the mandate of the United States Court of Military Appeals, you are hereby instructed to take action in accordance with the decision of the United States Court of Military Appeals, and to order a rehearing if such rehearing is practicable.

3. It is requested that you forward to this office ten (10) copies of the supplementary order promulgating the results of appellate review bearing the number of this case as follows:
(ACM 7031).

4. Incls.

1. R/T ACM 7031.
2. Initial promulgating order.

Yet it is unmistakable from the testimony of all of the expert witnesses—and the comments of counsel for both Government and defense—that, in the present trial, AFM 160-42 was regarded by the experts as controlling, and was of infinitely greater influence on the psychiatric testimony than was TM 8-240 in either Smith or Kuniak.

This influence would appear harmless—to the extent that the principles prescribed in AFM 160-42 for the determination of mental responsibility constitute correct statements of military law. In this connection we must advert once more to the "policeman at the elbow" test, which played a major role in the present trial, and which was promulgated in paragraph 5*a* of the publication with which we are concerned here. In speaking of this somewhat ambiguous test, the majority said in United States v. Smith, supra:

> "The basic difficulty is that which may arise from a too literal application of the 'policeman' test. Perhaps, indeed, the accused would not have committed the offense in the company of a policeman, or of anyone else for that matter, for the plain reason that he wished to act in private—this despite the fact that he nonetheless knew he would be apprehended forthwith. Perhaps, too, he would not have attempted the deed with a policeman at his elbow, because he feared that the policeman would halt him prior to its completion. Cf. Davidson, Forensic Psychiatry, supra, page 8; Neustatter, supra, page 97. Also, perhaps the presence of a policeman would have served to make more vivid to his mind the prospect of ultimate apprehension and punishment. And perhaps, finally, the presence of the policeman would have exercised some other symbolic effect in precluding or delaying the commission of the offense—quite apart from the probability of detection and punishment arising from his presence. Cf. MacNiven, Psychoses and Criminal Responsibility, Mental Abnormality and Crime, 1944, page 53.
>
> "These possibilities appear to be somewhat theoretical. Yet psychiatrists on occasion are prone to draw distinctions difficult for lawyers and judges to comprehend. In light of these, it is distinctly possible that the 'policeman' test—literally applied—may mislead. Therefore, the wording of the 1953 edition of TM 8-240 should be utilized as a guide for instructions and the like. Indeed, in a case in which it is clear that the trial was premised on an erroneous, overly literalistic construction of the 'policeman' test, as phrased in the 1950 Technical Manual, we might well be compelled to reverse."

156 In the case at bar we entertain no doubt that a much too literalistic interpretation of the "policeman" test was adopted

by both Captain Graves and Colonel Martin. For them, it was not the likelihood of *apprehension* implicit in the test which served as the criterion. As a matter of fact, absent any sort of policeman, and pretermitting subsequent admissions on Mrs. Covert's part, the likelihood of detection of her crime was little short of enormous. Quite understandably the accused—contemplating suicide as she seems to have been, according to evidence from both defense and Government—would have been unaffected by any degree of probability that her act would be discovered by the police, even if she had been able to weigh that probability consciously. On the other hand, the presence of a policeman, *or that of any other person*, might have shocked Mrs. Covert from pursuance of her dazed and virtually automatic behavior—completely apart from any suggestion of apprehenison and ultimate punishment. In Captain Graves' view, the presence of her children would have served equally well—better perhaps in fact—to prevent Mrs. Covert's commission of the crime, regardless of whether their appearance in the room would have enhanced the probability of detection and apprehension to any measurable extent. Perhaps Colonel Martin in his post-trial affidavit best expressed this concept, which he seems to have shared with Dr. Graves. He indicated that the presence of a policeman, or of anyone else, "at the elbow" would have served as a slap in the face, which would have startled the accused from her virtual trance.

It will be recognized, of course, that, when properly applied, the "policeman" test, as provided in AFM 160-42, is not at all directed to the effect of a policeman's presence as a "slap in the face," but rather to its suggestion of the likelihood of immediate detection of the crime and apprehension of the perpetrator. United States v. Smith, supra. By reason of their obvious misinterpretation of the publication under consideration—which, like the experts called by the defense, they mistakenly interpreted to possess *per se* a binding force—Colonel Martin and Captain Graves concluded that
157 the accused *could* adhere to the right. Under a correct interpretation they—and conceivably Major Troy too—might well have concluded that the accused had been irresponsible mentally at the time of the killing. We simply cannot know what they would have believed in the present circumstances.

The error in applying the "policeman" test is too pervasive here to permit affirmance of the findings of guilty. In this connection, the present situation can be distinguished with ease from that exemplified in United States v. Smith and United States v. Kunak, supra. In the former, the real issue at the trial was whether Mrs. Smith was suffering from a mental defect, disease or derangement within the meaning of the Manual for Courts-Martial. This circumstance fortified the majority in its conclusion that there was

no significant possibility that the result at the trial might have been influenced by any misinterpretation of, or ambiguity in, the "policeman" test promulgated in the relevant Army Technical Manual. On the other hand, Mrs. Covert suffered—according to the Government's experts—from a dissociative reaction, which is regarded in the Joint Armed Forces Psychiatric Definitions, Sr. 40-1052-2, NAVMED P-1303, AFR 16-13A as a psychoneurotic condition, and is clearly not a character and behavior disorder. Indeed, apparently all of the psychiatrists here would have agreed that the accused labored under a mental disease or derangement—and the critical issue had to do with the extent to which this mental disease or derangement had operated to destroy her ability to adhere to the right. In resolving this issue, the accused was distinctly prejudiced by a palpable misconstruction of AFM 160-42, from which the law officer failed to relieve her.

In the Kunak case, the concurrence stressed that the defense was scarcely in a position, under the circumstances of that case, to take advantage of ambiguities in the "policeman" test. Also, Judge Latimer explained there that the instruction by the law officer based on this test might well have been beneficial to the accused.

158 As a matter of fact, Kunak's defense of irresponsibility—like that of Mrs. Smith—encountered as its initial and chief obstacle the conclusion by expert witnesses that he was suffering from a mere "character and behavior disorder." Mrs. Covert, however, met no similar difficulty—for *all* of the experts in this case appear to have agreed that hers was more than a character disorder. Her hurdle lay in the misconstrued "policeman" test—one with which her defense should never have been confronted.

In view of our disposition of the second issue specified under the accused's petition, it is unnecessary that we deal in detail with the remaining two.

VI

Before terminating this opinion, it should be commented that the record reveals a defense presentation by Major J. Schweizer—military defense counsel at the trial—which could scarcely have been excelled in alertness, ability, and preparation, and which furnished the accused with a firm foundation on which to capitalize for appeal purposes on the ambiguity in the "policeman" test.

Since it is evident that a rehearing is required if we are to avoid the danger of a substantial miscarriage of justice, the record of trial in the instant case is remanded to The Judge Advocate General, United States Air Force, for rehearing or other action not inconsistent with this opinion.

QUINN, Chief Judge (concurring):

In my dissent in United States v. Kunak, 5 USCMA 346, 17 CMR 346, and in United States v. Smith, 5 USCMA 314, 17 CMR 314, I deprecated the Court's sanction of the use of service manuals on psychiatry as affirmative evidence in a court-martial trial. In the *Kunak* case, I pointed out that this kind of technical manual "circumscribes the testimonial freedom" of the military expert witness. In the *Smith* case, I noted that the military medical experts were obviously testifying to what they believed the service
159 manuals required, "to the exclusion of their individual professional beliefs." This case confirms my fear that use of the technical manuals on psychiatry are depriving the accused of the right to unbiased and truly professional opinions from military psychiatrists.

I am glad Judge Brosman has recognized the improper influence of the technical manual in this case, and I concur with him in setting aside the conviction and ordering a rehearing. At the same time, I cannot refrain from expressing regret that he has not joined me in a general condemnation of the present use of the service manuals as a restrictive influence on the testimonial freedom of the service doctors.

LATIMER, Judge (concurring in part and dissenting in part):

I concur in part and dissent in part.

I do not share the regrets of the Chief Judge and I do not join in his reasons but his position has consistency in its favor. Certainly, if each future case is to be decided on the basis of whether the military experts in the field of psychiatry do or do not understand the principles which they teach and promulgate, then he has the best side of the argument. However, his assertions do not encourage my support because a careful reading of the opinions in United States v. Kunak, 5 USCMA 346, 17 CMR 346; and United States v. Smith, 5 USCMA 314, 17 CMR 314, will disclose that the author of the present base opinion has not changed the principles a majority of the Court therein announced. All he has done is to escape their effect by a side-door exit which can be labelled the door for confused experts. Obviously, his purpose is to differentiate this case from those on a narrow ground, but one which I do not find supported by the record. Because of that and because this result is reached through a three-way conceptual approach, with no new principles of law established, an extended discussion of the questions certified and the errors assigned is unnecessary. However, I consider it advisable to place on record my reasons for not joining in an order directing a rehearing in this case.

160 The disagreement between Judge Brosman and the writer narrows to the single question of whether the psychiatrists

who testified for the Government misunderstood one criterion proposed as a means of measuring an irresistible impulse. I conclude they did not and I hope to support my views by a reference to their testimony. In addition, while I will not develop the point, I believe it distinctly arguable that even assuming the medical experts favorable to the Government misunderstood the test, the confusion was beneficial to the accused.

It is of singular importance to note that four psychiatrists and one psychologist testified at the trial. They were stationed in the same military community, all worked together on this particular case, and each had the benefit of the findings and conclusions of the other. Their education, training and experience was extensive and their qualifications to understand and deal with the principles of psychiatry must be conceded by all. One psychiatrist and one psychologist testified in support of the accused. Two psychiatrists testified partly in support of the Government's cause and partly in opposition thereto. One psychiatrist testified solely in favor of the prosecution's theory. It could happen, I suppose, but it is a bit unusual that only those who testified that the accused was sane are charged by the majority opinion with having misunderstood a principle of psychiatry which dates from the time of the McNaughten rule. They alone are charged with misapplying the policeman at the elbow illustration found in the Air Force Manual. While this case turns on the possibility of misinterpretation found by the majority, I am perfectly willing to accept as my first supporting witness, Dr. Heisler, a very fine defense witness, who testified to the effect that the principles outlined in the Air Force Technical Manual are easy to work with. He had this to say on the matter:

> "Q. The defense counsel has cited certain textbooks with which you have said you were familiar, as authorities in the field of psychiatry. Are you also familiar with Air Force Manual 160-42, Psychiatry in Military Law?
>
> A. Yes, sir.
>
> 161 "Q. Do you consider that to be an accurate statement of psychiatry as applied to military law?
>
> A. To the military law, yes. It's a regulation which we must follow.
>
> "Q. Are you in agreement with it?
>
> A. Essentially, yes. I believe that let's put it this way: one can easily work within the framework of the interpretations given in that manual, and we make every attempt to do so."

Moreover, in answers to questions propounded by defense counsel —and, parenthetically, I add that all of the expert witnesses were

entitled to exercise the same mental freedom exercised by Dr Heisler—he replied:

"Q. Doctor, do you think it would have made any difference on the night of 10 March, to use an old and classic example, if a policeman had been standing near her?

A. I don't think it would have made any difference, short of physical restraint.

"Q. Doctor, in your examinations and conferences with her, has Mrs. Covert ever made any statement as to whether or not any person who might have been standing there would have influenced her or not?

A. Yes; she did.

"Q. What did she say, Doctor?

A. Well, the first occasion when it came up more or less spontaneously, she stated—I think, being a Southerner—it wouldn't have made any difference whether General Sherman had been standing there or not, and on subsequent occasions, taking into consideration the legal questions involved—this was a couple weeks later—I asked her specifically about the question relating to a policeman being there, and she felt that she would not even have noticed the policeman. She interpreted the question herself on that occasion as meaning he would physically restrain her, which makes the answer obvious that she herself felt it, which corroborates my own impression that, short of physical restraint, she would neither have noticed or been deterred by the presence of any other individual, as she was not deterred by the presence and very close approximation of her two children to the scene of this act.

As my next supporting witness, I rely on Dr. Adelsohn, a psychologist, who, like Dr. Heisler, testified definitely and positively that Mrs. Covert was insane. He seems not to have been mentally disciplined by the Technical Manual in the expression of his views and to have understood how the test could be applied to establish insanity. This is his testimony:

"Q. Are you familiar with the term 'irresistible impulse'?

A. Yes; I am.

162 "Q. Do you think that the definition of irresistible impulse is accurately stated when it is stated that it is an act that a person would do even if a policeman were at their side?

A. I am acquainted with that, the use of that criterion.

"Q. You believe that is an accurate definition of what it is?

A. I consider it a rather accurate definition; yes.

"Q. Do you believe that an irresistible impulse is an act

that a person would commit even if there were policeman [sic] at their side?

A. It appears to me that the policeman being alongside is merely one of many possible criteria by which one can determine whether an act is motivated by an irresistible impulse. In other words, I don't believe I can accurately answer your question very flatly. May I try to clarify that?

"Q. Go ahead.

A. I believe there are other conditions that can—other ways of determining whether an impulse is an irresistible one. The policeman being alongside is certainly a perfectly legitimate one, I feel.

"Q. Are you familiar with Air Force Manual 160-42?

A. Not well, but I have read it.

"Q. Calling your attention to paragraph 5c, wherein irresistible impulse is defined as an act that a person would not have committed if there had been a military policeman at his elbow; do you believe that that is a complete and accurate definition of the term?

A. Yes; I do. I accept it."

If, as these defense witnesses testified, the test is accurate and easy to apply, I wonder why the testimony of the two experts whom I catalogue as testifying partly to the benefit of the accused and partly to assist the Government is interpreted as showing confusion. I place Doctors Martin and Graves in sort of a neutral class for the reason that, while both testified the accused could distinguish right from wrong and adhere to the right, each expressed an opinion that her mental faculties were so impaired that she did not have the capacity to premeditate. However, their post-trial affidavits show clearly they were favorably inclined toward the accused. While Dr. Graves was not asked to express an opinion on the policeman at the elbow test, I find these questions and answers in the record:

163 "Q. Do you believe, from your observation of the accused, that the act she committed on the 10th of March was the result of an irresistible impulse?

A. Irresistible impulse is not a term that we use in psychiatry. I would have to ask you to define what you mean by 'irresistible impulse' before I could answer your question, I think.

"Q. I call your attention to the definition of irresistible impulse in Air Force Manual 160-42, Psychiatry in Military Law, to paragraph 5c, which sets out the example that the accused would have committed the act even if there had been a policeman at her elbow as being an example of an irresistible

impulse; and with that definition in mind, I ask you, do you feel that the accused acted as a result of an irresistible impulse?

A. No.

"Q. Do you feel that if a policeman were present, or someone else were present, she would have refrained from the act?

A. Yes, I do.

Q. You have stated that she was able to adhere to the right, had she chosen to; is that correct?

A. Yes."

This witness had testified that the accused could distinguish right from wrong at the critical time. He followed that testimony by asserting that Mrs. Covert could adhere to the right and he was then asked how he made that determination. In substance he stated that she committed the offense under strong emotional pressure but he concluded she could adhere to the right because her whole life's pattern was to that effect, and he found nothing which would indicate that at the time of the killing she would not be guided by her previous pattern of behavior. If that was the basis for his conclusion, the one Technical Manual criterion played no part.

In connection with the testimony of Dr. Martin at the trial, the policeman at the elbow test seems to have been of little moment because if it was referred to, it was mentioned only once. That particular criterion is probably involved in the following single question and answer:

"Q. In answer to one of the defense counsel's questions, I believe the gist of the answer was that the rightness or wrongness of the act did not influence her behavior. Do you mean by that answer that her act was an irresistible impulse, as defined by Air Force Manual 160-42?

A. With that qualification, as defined by this manual, I do not feel that it was what they call an irresistible impulse."

164 As I hope to develop later, while Dr. Martin's ultimate conclusion may have been influenced in part by this test, he did not complain because he misunderstood it, but because he believed the general principles of psychiatry set out in the Technical Manual were too restrictive. Beyond question he asserted that the accused could distinguish right from wrong and that her ability to adhere to the right was only partially impaired and not totally abrogated. He, however, subsequently sought to make that partial impairment sufficient proof of insanity to exculpate the accused from the legal wrong of the homicide—a position a majority of this Court has refused to take.

Major Troy was the one expert who testified that Mrs. Covert had the mental capacity to form an intent to kill and to pre-

meditate and that she was sane and responsible for her act. He was interrogated about the policeman at the elbow test and he had this to state:

> "Q. Are you familiar with the provisions and standards laid down of mental responsibility in Air Force Manual 160-42?
> A. Pretty well.
> "Q. Under the standards laid down in that manual and the definitions therein, do you consider that at the time she committed the act on 10 March 1953, she did so as the result of an irresistible impulse, as therein defined?
> A. No; I do not believe it was an irresistible impulse.
> "Q. You believe she would have committed the act had there been a policeman at her side?
> A. No; I do not believe she would have."

He was cross-examined at some length on the general principles of psychiatry as announced in standard works and he showed substantial agreement with those principles but he was unshaken in his belief as to the sanity of the accused. Nothing in his direct or cross-examination leads me to conclude that he did not well and truly understand and use the criterion. Apparently I am not alone on this conclusion as my associate has not persuasively presented him as one of the experts operating in the area of confusion.

165 I have searched the record of trial rather diligently and I am unable to find any expert who claimed he was confused by the criterion or that he misunderstood its underlying concept. No one at the trial level seemed to have been conscious of any misapplication of the test and all must have considered it in arriving at their conclusions. Those who were asked, testified it was appropriate and accurate, and they apparently used it to their own satisfaction. No one expressed any reservations about its application until after findings and sentence and then the findings brought forth some protests. I, therefore, pass on to consider the post-trial affidavits. Before doing so, I prefer to mention again that the training and qualifications of the five experts who were called as witnesses cause me to wonder how doctors who were so well trained, educated and experienced in the field of psychiatry could misunderstand a basic principle which has long been a cornerstone in determining mental responsibility. As a general observation, I would say, in the light of the education, training and experience of these experts, and from the amount of time they expended in examining this accused, I believe this case is a poor vehicle for supporting a contention that those who testified could not interpret and apply properly the various criteria by which the irresistibility of an impulse may be tested.

There were post-trial affidavits furnished by Doctors Martin,

Graves and Adelsohn. Dr. Adelsohn in no way questioned the Technical Manual and he merely corroborated his in-court testimony. At the trial and in his affidavits he stated the accused was suffering from "psychosis, specifically, paranoid schizophrenia." Furthermore, in his post-trial statement he related his disagreement with certain other expert witnesses by saying he could not concur with "a finding of neurotic depression, as that is counter-indicated by the bulk of the data I have gained from the patient's responses, and I am of the opinion that this data was not effectively or intensively examined by the members of the Sanity Board."

166 Dr. Graves' views as expressed in his post-trial statement, can best be stated by quoting part of his affidavit. It provides:

> "I should like to make clear to the reviewing authority, that which I apparently did not make clear to the members of the court, that the members of the Sanity Board were, of necessity, governed in making their decisions by the provisions of Air Force Manual 160-42. It has been difficult for me, and I assume for other members of the Board, to clearly express our feelings about this case within the framework of this Air Force Manual. According to the provisions of this Manual, I, as a Psychiatrist, had no choice but to find this individual sane. In the field of psychiatry however, more than in any other field of human knowledge, it is impossible to express the complexities of human behavior in terms of black and white. As a psychiatrist it is my training and my professional function to view all human behavior in its proper shade of grey. I clearly understand that it is the purpose and duty of the members of the court to consider my evaluation of the 'shade of grey' terms. However, it does not follow that because the patient was not insane at the time of the commission of the offence that she must therefore necessarily have been guilty of an [sic] conscious *premeditated* crime. There is, I must state again, no psychiatric evidence of any sort which would lead me to believe that there was sufficient degrees of conscious participation in the planning and execution of this act to refer to it as a premediated crime. To consider it as such would in my opinion, from considerable knowledge of the past history and personality structure of this person, be a clear cut miscarriage of justice."

I cannot find in that statement any attack on the policeman at the elbow test and the restrictions imposed by the Air Force Manual embrace principles far more important than the illustration of an irresistible impulse given there. As I read this witness' trial testi-

mony, he states unequivocally that the severe emotional stress under which the accused was laboring only impaired her mental capacity to know right from wrong and adhere to the right. To support his conclusion he used several criteria. His affidavit in no sense undermines his conclusion on partial impairment and its principal attack centers on the finding of premeditation.

Dr. Martin's post-trial affidavit contains no assertions that he misunderstood the Technical Manual and only by asserting that he misunderstood several criteria mentioned by him can that conclusion be reached by the majority opinion. He should be the best witness to his own confusion and as I read the record, I believe he well understands the purpose and intent of the doctrine an-
167 nounced by the Air Force. He does not misunderstand, he just honestly disagrees. He does not say that the policeman at the elbow test is different from a fear of detection test. As a matter of fact he does not mention the latter, but if he is at all familiar with the 1950 Technical Manual, and I must assume he is, he should be well aware that the sentence which specifically deals with the policeman at the elbow test is followed by this statement: "No impulse that can be resisted in the presence of a high risk of detection or apprehension is really very 'irresistible'." Moreover, his enumeration of several different criteria does not mean one is the exact counterpart of the other. More probably he was expressing different rules ' , which he measured his conclusion that the accused did not reach the irresistible impulse stage. He, too, positively testified—and this conclusion is not modified by his subsequent statement—that the mental impairment of the accused was only partial. He might like to escape the principle that a partial impairment does not render the accused mentally irresponsible, but I had thought a range as wide as he probably desires to roam had been narrowed by our decisions in Smith and Kunak. Now I find it is widened by a different method of approach. It may well be that I, in turn, misunderstand his purpose; but, in my opinion, what he is seeking in the way of a principle is this: That if the accused is suffering from a dissociative reaction, and it is not of sufficient severity to deprive her completely of her ability to adhere to the right, the psychiatrist should be permitted to erect his own standards of insanity. He would not testify that Mrs. Covert was psychotic and neither would he testify that her personality breakdown resulted in a total impairment of her capacity to know right from wrong or adhere to the right. He kept her within the area of sanity as we have defined it and yet he would like to remove her. His complaint, closely analyzed, is that a psychiatrist should be permitted to base a conclusion of insanity on his finding that an accused is not fully responsible for his or her behavior.

168 Dr. Martin sums up his belief in his own words and they support my assertion. He displays his desires in the following words:

> "All of my feelings about this case can be summed up in the statement that I believe Mrs. Covert was what I would call 'temporarily insane' on the night of 10 March 1953. Since this is a legal and not a psychiatric term, I may have the wrong understanding. The term 'insanity', to me, means that the individual is not responsible for his or her behavior. My understanding of 'temporary insanity' does not make it synonymous with the term 'psychosis'. There are a number of mental or emotional reactions not included in Air Force Manual 160-42 which I could classify as a form of insanity from my understanding of the term that would more adequately describe the condition of Mrs. Covert on the night of 10 March without saying that she was psychotic."

I realize that it is possible to take statements out of context and use them to support a theory, but a fair reading of this record convinces me that confusion concerning certain principles of psychiatry did not exist in the minds of these experts. What I do find in the record is a disagreement in the ultimate conclusions of the experts. The disagreement arises solely over whether Mrs. Covert's depressed reaction had reached such a level that there was a total abrogation of her mental capacity to adhere to the right or whether there was a partial impairment which left her some degree of choice.

Doctors Heisler and Adelsohn were convinced completely that Mrs. Covert was psychotic and acted as an automaton; that nothing short of physical restraint would have prevented this killing; and that she was legally insane. Doctors Martin and Graves would not go that far as they concluded there was only a partial impairment of the capacity to adhere to the right. They believed that her condition could not be characterized as psychotic and that she was legally sane, but stated that if they were free to use their own standards for sanity, they would find her insane. Dr. Troy stood off by himself as he concluded there was no impairment in her capacity to know right from wrong and adhere to the right and she was sane and could premeditate.

169 In the light of our previous holding, I fail to see how Dr. Graves and Dr. Martin can be freed from some discipline by our pronouncements on psychiatric principles. Both testified that the accused could distinguish right from wrong and adhere to the right. At best they could only find a partial impairment in her mental capacity. However, not only does the Technical Manual set out the principle that partial impairment may not be equated to mental irresponsibility, but the Manual for Courts-Martial,

3. Decn. of USCMA (in dup.) w/mandate.
4. Receipt (in dup.)

(Signed) REGINALD C. HARMON,
Major General, USAF,
The Judge Advocate General,
United States Air Force.

172 EXHIBIT "H" TO RETURN AND ANSWER

Headquarters Command, United States Air Force, Bolling Air Force Base, Washington 25, D. C., 12 July 1955

General Court-Martial Order No. 17

In the general court-martial case of Clarice B. Covert, United States Passport Number 0046309, a person accompanying the Armed Forces of the United States without the continental limits of the United States and the possessions thereof, pursuant to Article 67, the findings of guilty and the sentence as promulgated by General Court-Martial Order No. 14, Headquarters, 7th Air Division, APO 125, c/o Postmaster, New York, New York, dated 22 June 1953, were set aside on 24 June 1955. A rehearing is ordered before another court-martial to be hereafter designated.

BY ORDER OF THE COMMANDER:

N. H. VAN SICKLEN,
Colonel, USAF,
Chief of Staff.

Official:
JOSEPH C. NEWTON,
Major, USAF,
Adjutant,
(ACM 7031).

Distribution: A; X

1 cy Mrs. Clarice B. Cover, Federal Reformatory for Women, Alderson, West Virginia;
1 cy Commander, HEDCOM, USAF, BAFB;
10 cys TJAG, USAF, Hq. USAF, Wash. 25, D. C.;
5 cys Commander, 7th Air Division, APO 125, c/o Postmaster, New York, N. Y.;
2 cys Warden, Federal Reformatory for Women, Alderson, West Virginia;
5 cys AAG, USAF, Hq. USAF, Wash. 25, D. C.;
1 cy GAO, AF Audit Branch, 3800 York Street, Denver, Colorado;
10 cys SJA, HEDCOM, USAF, BAFB;
1 cy CG, 2nd Army, Fort Meade, Maryland.

173 EXHIBIT "I" TO RETURN AND ANSWER

13 July 1955

Mr. Don Clemmer
Director, Department of Corrections
District of Columbia
300 Indiana Avenue, N. W.
Washington, D. C.

Dear Mr. Clemmer:

Mrs. Clarice B. Covert was tried and convicted by a military court in England on 29 May 1953 for the offense of murder. She was sentenced by the court to life imprisonment and is presently serving her confinement in the Federal Reformatory for Women, Alderson, West Virginia.

The United States Court of Military Appeals has recently set aside the findings and sentence of the court and have directed a rehearing.

I am charged with the responsibility for the retrial of Mrs. Covert and for her security and custody. It is anticipated that she will be released from the Federal Reformatory and I have requested the warden of that institution to deliver her to my representatives at that time.

There being no suitable custodial facilities for women at any military installation in the Washington, D. C. area, it is requested that you confine her in the District of Columbia Jail, pending her retrial by court-martial at Bolling Air Force Base.

Thanking you for your help in this matter, I am,

Sincerely yours,

STOYTE O. ROSS,
Brigadier General, USAF Commander.

174 EXHIBIT "J" TO RETURN AND ANSWER

R. & D. #4

District of Columbia Jail
200 19th Street, S. E.
Washington 3, D. C.

Date July 14, 1955.

Received from the U. S. Military Authorities Department, Washington, D. C., the body of:

CLARICE B. COVERT, W/F

By: CURTIS REID,
For the Superintendent, District Jail, (Signature illegible).

175 EXHIBIT "K" TO RETURN AND ANSWER

Law Offices

Frederick Bernays Wiener

Suite 815 Stoneleigh Court
1025 Connecticut Avenue, N. W.
Washington 6, D. C.

Telephone District 7-2163

15 July 1955

Commander,
Headquarters Command USAF,
Bolling Air Base,
Washington 25, D. C.

Re: United States v. Mrs. Clarice B. Covert

Sir:

The accused in the above-entitled case is now being held for trial on rehearing following the decision of the U. S. Court of Military Appeals in her case (ACM 7031; USCMA No. 4974).

As counsel for Mrs. Covert, I request that she be examined as to her present mental condition, and that for this purpose she be transferred for observation and examination to a suitable medical installation.

Respectfully,

FREDERICK BERNAYS WIENER,
Counsel for Mrs. Clarice B. Covert.

FBW/dmw

176 EXHIBIT "L" TO RETURN AND ANSWER

21 Jul. 1955

Department of Health, Education and Welfare
Attention: Dr. Winfred Overholser
Superintendent, Saint Elizabeths Hospital
Washington, D. C.

Dear Dr. Overholser:

This is to confirm the telephone conversation between you and Colonel William H. Ward, Jr., of my office on 19 July 1955. As you know, it is the desire of the Air Force that Mrs. Clarice B. Covert be admitted to Saint Elizabeths Hospital for psychiatric

observation and diagnosis pending disposition of her case by the Air Force.

Mrs. Covert was tried in England by an Air Force general court-martial for the premeditated murder of her husband, Master Sergeant Edward E. Covert. The authority of the Air Force to exercise jurisdiction over Mrs. Covert is contained in Article 2(11) of the Uniform Code of Military Justice (64 Stat. 108; 50 USC, Chap. 22, § 552), as, at the time of the offense, she was accompanying the armed forces outside the continental limits of the United States. Jurisdiction, having lawfully attached, is retained until completion of appellate processes in the case. The United States Court of Military Appeals directed that the record of trial be returned to The Judge Advocate General for rehearing or such other action as is not inconsistent with the Court's conclusions. The case has been forwarded to an officer exercising general court-martial jurisdiction, in this case the Commander, Headquarters Command, Bolling Air Force Base, Washington 25, D. C., for further action not inconsistent with the decision of the United States Court of Military Appeals. That officer is responsible for making the final determination as to whether the charges against Mrs. Covert should be retried or dismissed, and on 12 July 1955 he ordered that a rehearing be held.

As you requested, I have inclosed copies of the decisions of the Board of Review and of the United States Court of Military Appeals in this case. You will not that the Court of Military Appeals determined that the evidence adduced at trial raised the issue of Mrs. Covert's mental responsibility and that error resulted from the failure to instruct the members of the court-martial that they could consider any mental deficiency short of legal insanity in determining the accused's capacity to premeditate. On the other hand, the Board determined that mental impairment short of legal insanity did not constitute a defense to the charge of premeditated murder, nor could such partial mental irresponsibility be considered as affecting the accused's ability to premeditate. Of course, the decision of the Board does not correctly state the law of mental responsibility as it is applied in criminal law today. The decision of the Board, while it does not represent the law of the case, does set out the circumstances attending the commission of the offense and pertinent testimony of the expert witnesses. Thus I believe it will be helpful to you in that respect. It should be noted, too, that the Court of Military Appeals did not merely order the affirmance of findings of guilty of murder without premeditation because a majority felt that the "policeman at the shoulder" test set out in AFM 160-42 was mis-

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understood by certain of the expert witnesses. Copies of the manual in effect at the time of the offense and as presently amended are inclosed for your information. In addition, the Staff Judge Advocate, Headquarters Command, has advised that he will make available to you for your assistance in the psychiatric study a copy of the record of trial and all available medical records relating to Mrs. Covert.

The Federal Reformatory for Women, Alderson, West Virginia, was designated as the place of confinement pending completion of appellate review, and on 25 June 1953 Mrs. Covert was committed to that institution. On 14 July 1955, following the receipt of the mandate directing a rehearing or other action not inconsistent with the opinion of the Court of Military Appeals, the Commander, Headquarters Command, Bolling Air Force Base, secured Mrs. Covert's release from the federal reformatory. She was brought to Washington, D. C., and, with the concurrence of the Director, Department of Corrections for the District of Columbia (Mr. Don Clemmer, Deputy Director), was confined in the District of Columbia jail on 14 July 1955. She is presently being retained in that confinement facility awaiting further disposition of her case. Her confinement was ordered under the authority of the Uniform Code of Military Justice, Article 10 (50 USC, Chap. 22, § 564).

In view of the issues raised at trial pertaining to Mrs. Covert's mental responsibility at the time of the offense, and the possibility that further issues may be raised upon the rehearing as to her present sanity or her mental capacity to stand trial, the Commander, Headquarters Command, USAF, has determined that further psychiatric evaluations will be necessary to assist
178 him in deciding future action in the case. However, the facilities available to the Air Force in this area for conducting an inquiry into her mental condition and providing the necessary restraint incidental thereto, are inadequate. Accordingly, pursuant to the Economy Act of 1932, as amended (31 USC, § 686), it is requested that authority be granted to admit Mrs. Covert to Saint Elizabeths Hospital for a period of 90 days, or such additional period of time as you may deem necessary, for the psychiatric observation and diagnosis. It is further requested that a report of the findings of the psychiatrists be forwarded in quintuplet to the Commander, Headquarters Command, Bolling Air Force Base, Washington, D. C.

Upon approval of Mrs. Covert's transfer to your institution, reimbursement will be effected as provided in the Economy Act. Therefore, a Voucher for Transfers between Appropriations and or Funds (SF 1080) should be forwarded to the Office of The Surgeon General, USAF, Attention 34.3, Headquarters, United States Air

Force, Washington 25, D. C. when you have determined the amount involved.

Sincerely,

(Signed) REGINALD C. HARMON,
Major General, USAF,
The Judge Advocate General,
United States Air Force

3 Incls.

1. Decn. of B/R, 19 Feb. 54.
2 Decn. of USCMA, 24 June 55.
3. AFM 160-42.
CC: SJA, Bolling AFB.

Coordinated by telephone with General Twitchell who coordinated for General Ogle, Surgeon General. Kuhfeld
AFCJA-21, Capt. Gobrecht.
AFCJA-21, Col. Ward.
AFCJA-10, Col. Norton.
AFCJA-2, Gen. Kuhfeld.
AFABF-6, Berger, Maj.

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Department of
HEALTH, EDUCATION, AND WELFARE

Saint Elizabeths Hospital
Washington 20, D. C.

Address only The Superintendent, Saint Elizabeths Hospital

July 25, 1955.

Major General Reginald C. Harmon,
The Judge Advocate General,
United States Air Force,
Department of the Air Force,
Washington 25, D. C.

Dear General Harmon:

Receipt is acknowledged of your communication of July 21, 1955 requesting that Mrs. Clarice B. Covert, a prisoner now in the custody of the United States Air Force, be admitted to St. Elizabeths Hospital for psychiatric observation and diagnosis.

I am authorized to approve such transfer, which was effected as of this date, July 25, 1955.

Under the provisions of the Economy Act of 1932 a voucher

(SF 1080) will be forwarded to the Surgeon General of the United States Air Force, Attention 34.3, Headquarters United States Air Force. As yet the per diem rate for the current fiscal year has not been set by the Bureau of the Budget and the voucher therefore will not be forwarded until later. However, based on current information, the cost of 90 days' care should be about $485.00. It is understood that Mrs. Covert is admitted to this hospital for a period not exceeding 90 days unless an additional period is deemed necessary for psychiatric observation and diagnosis.

Report of the findings of the psychiatrists will be forwarded as you request in quintuplicate to the Commander of the Headquarters Command, Bolling Air Force Base.

Sincerely yours,

WINFRED OVERHOLSER, M. D.,
Superintendent.

180 EXHIBIT "M" TO RETURN AND ANSWER

TC: The prosecution requests the court to take judicial notice of Third Air Force Regulation 111-2 and 111-2A, dated 16 September 1952 and 9 October 1952 respectively, in general, and specifically paragraphs 1, 2 and 4, subparagraphs a, b and c.

DC: No objection, provided they are attached as appellate exhibits.

LO: The regulations requested will be marked as Appellate Exhibit No. 5. The court will take judicial notice of these regulations and their contents. They will be attached to the record as Appellate Exhibit 5.

TC: Prosecution requests permission to read to the court the specific paragraphs referred to in Appellate Exhibit 5 and request they take judicial notice thereof.

LO: They may be read.

TC: The regulation is entitled Military Justice, The United States of America (Visiting Forces Act 1942):

> 1. *Purpose.* The purpose of this regulation is to outline the laws of the United Kingdom facilitating U. S. Courts-martial jurisdiction.
>
> 2. *Scope.* The United Kingdom laws outlined in this regulation are applicable to all civilian and military personnel and their dependents under the jurisdiction of the Third Air Force and 7th Air Division.
>
> . . . . . .
>
> 4. *USA Visiting Forces Act, 1942* (5 & 6 Geo. 6, Ch. 31, 6 August 1942) This Act of Parliament surrenders to the United

States military authorities and courts-martial the jurisdiction of the courts of the United Kingdom in *criminal* cases. It is now the sole responsibility of this command to try and, on conviction, punish all criminal offenses which members of this command may be alleged, on sufficient evidence, to have committed in the United Kingdom. The following are pertinent provisions of that Act:

181 a. *US Forces Not to be Prosecuted in United Kingdom Courts.* Section 1 of this statute is as follows: 'Subject as hereinafter provided no criminal proceedings shall be prosecuted in the United Kingdom before any court of the United Kingdom against a member of the military or naval forces of the United States of America: Provided that upon representations made to him on behalf of the Government of the United States of America with respect to any particular case, a Secretary of State may by order direct that the provisions of this subsection shall not apply in that case.'

b. *Definition of US Forces:* Section 2(1) of this statute is as follows: 'For the purpose of this act and of the Allied Forces Act, 1940, in its application to the military and naval forces of the United States of America, all persons who are by the law of the United States of America for the time being subject to the military or naval law of that country shall be deemed to be members of the said forces: Provided that no person employed in connection with the said forces, not being a citizen or national of the United States of America, shall be deemed to be a member of those forces unless he entered into that employment outside the United Kingdom.'

c. *Method of Proving Membership in US Forces.* Section 2(2), (3) and (4) of this statute are as follows: '(2) For the purposes of any proceedings in any court of the United Kingdom, a certificate issued by or on behalf of such authority as may be appointed for the purpose by the Government of the United States of America stating that a person of the name and description specified in the certificate is, or was at the time so specified subject to the military or naval law of the United States of America, shall be conclusive evidence of that fact. Such certificate will be issued only by an officer of field grade or above. (3) For the purposes of any proceedings in any court of the United Kingdom in which the question is
182 raised whether a party to the proceedings is, or was at any time, a member of the military or naval forces of the United States of America, any such certificate as aforesaid relating to a person bearing the name in which that party is charged or appears in the proceedings shall, unless the contrary is proved, be deemed to relate to that party. (4) Any document purport-

ing to be a certificate issued for the purposes of this section and to be signed by or on behalf of an authority described as appointed by or on behalf of an authority described as appointed by the Government of the United States of America for the purposes of this section, shall be received in evidence and shall, unless the contrary is proved, be deemed to be a certificate issued by or on behalf of an authority so appointed.'"

The prosecution requests permission to read to the court Prosecution Exhibit No. 7.

LO: You may read it.

TC: (Reading)

"HEADQUARTERS
3918th AIR BASE GROUP
RAF STATION UPPER HEYFORD
OXON, ENGLAND

11 March 1953.

CERTIFICATE

Pursuant to paragraph 4b, Third Air Force Regulation 141-2 (Visiting Forces Act of 1942), I certify that Mrs. Clarice B. Covert comes within the provisions of the UCMJ, MCM, US 1951, and further she is subject to Military Law of the United States Armed Forces.

US Passport—00463309, issued at Washington, D. C., United States of America.

Alien's Registration Certificate—A495066, issued at Bicester, Oxon, c/a 31 July 1952.

(Signed) ALVAN C. GILLEM,
(Typed) ALVAN C. GILLEM,
Colonel, USAF,
Commanding."

183-184 The prosecution calls as its next witness Sergeant Buckingham. RALPH BUCKINGHAM was called as a witness for the prosecution, was sworn and testified as follows:

DIRECT EXAMINATION

Questions by the prosecution:

Q. Will you state your full name, your occupation, and residence?

A. Ralph Buckingham, Superintendent of Police, stationed at Banbury, Oxfordshire.

Q. Sergeant Buckingham, do you know the accused in this case?

A. I do not, sir.

Q. Sergeant Buckingham, I direct your attention to on or about

the 11th of March, 1953, and ask you whether or not on that occasion you had an opportunity to have a conversation with Colonel Gillem of the 3918th Air Base Group, RAF Station Upper Heyford?

A. I did.

Q. Will you tell the court the circumstances surrounding that conversation?

A. It had been reported to me that a death had occurred at the Air Force station Upper Heyford, and it was suspected murder. I went to the station at Upper Heyford, and there I made certain inquiries and, in consequence of that, I had a conversation with Colonel Gillem, and the outcome of the conversation was that Colonel Gillem issued a certificate under the relevant sections of the Visiting Forces Act, to the effect that the accused was subject to United States military law.

Q. Sergeant Buckingham, I show you what has been marked Prosecution Exhibit No. 7 and ask you if you know what it is?

A. That is the certificate given to me by Colonel Gillem on the 11th of March, 1953, certifying that the accused was subject to United States military law.

Q. Was this certificate then accepted by you or your superiors?

A. It was. It was accepted by me for my chief constable.

Q. And who is your chief constable?

A. Mr. Rutherford.

Q. Sergeant Buckingham, I ask you whether or not then, the British police authorities took any further action in the case of Clarice B. Covert upon your acceptance of the certificate, Prosecution Exhibit No. 7, signed by Alvan C. Gillem?

A. We took no further action and handed over jurisdiction to the United States military forces.

185 In the United States District Court for the District of Columbia

RULING OF THE COURT.—November 22, 1955

THE COURT: In the present case, the petitioner while residing with her husband, a member of the United States Air Force in England, took the life of her husband and, of course, was subject to court martial under the provisions of Section 551 of Title 50 of the United States Code, the Air Force taking the position that this petitioner was a person accompanying the armed services abroad within the terms of this provision of the Code.

The case raises the very interesting question again of whether this petitioner as a civilian is entitled to the constitutional guarantees of the Fifth and Sixth Amendments or whether she was properly tried by court martial.

The Fifth Amendment, of course, exempts from its provision

as to due process those cases arising in the land or naval forces. The law appeared, until a few weeks ago, to have been rather definitely settled as to what constituted a case arising within the armed or naval forces, but the decision of the Supreme Court of the United States in the case of the United States of America ex rel. Audrey M. Toth, petitioner, vs. Donald A. Quarles, Secretary of the Air Force, decided on November 7, 1955, has virtually turned inside out a great many earlier decisions especially in Courts of Appeal and in United States District Courts.

186 It is true that the Toth case on several occasions refers specifically to the fact that Toth was an ex-soldier. He is described as a civilian ex-soldier. But the teaching of the case insofar as it relates to the right of the person to his constitutional guarantees in the face of court martial charges is that Toth was a civilian.

It does seem to this Court that the significant phraseology of the Toth case must be predicated upon the understanding that the Supreme Court is dealing with the rights of a civilian. The Supreme Court has decided that a civilian, even though he was in the military service at the time he committed a crime, is entitled to a trial by the civil courts. In short, the Supreme Court says—a civilian is entitled to a civilian trial.

Applying this principle to the present case, the Court must conclude that in this case the petitioner appears to be entitled to a trial by the civil courts. The Court believes that it is required to grant the writ of habeas corpus in the present proceeding.

The Court recognizes that there are great difficulties inherent in the Court's ruling today, because admittedly the military services have major and difficult problems in dealing not only with the civilians attached in official capacities but with the civilians who are members of the families of the armed forces on foreign stations.

187 I do believe that the problem created is one which is of ready solution by the Congress. There appears to be no difficulty in enacting statutes which would confer upon the District Courts of the United States the jurisdiction to try cases arising on these foreign stations in the same manner that crimes on the high seas are tried at the present time.

It seems that the Congress could legally declare that a civilian could be tried in the first jurisdiction in which the civilian is brought or in the jurisdiction where the civilian is found, in the same manner that the statutes now provide for this type of jurisdiction in cases involving crimes on the high seas.

I don't think the Court's observations in this regard are essential to its disposition of the present case. The Court will grant the writ in the present case.

188 Mr. WIENER: If your Honor please, I have the draft of the order here which is modeled after a recess ruling by Judge Goodman in the Northern District of California, where in a similar case he said:

> In view of the Army's clear lack of jurisdiction to court-martial petitioner for the offense charged, and the exceptional circumstances noted, the writ of habeas corpus will issue. Inasmuch as the relevant facts are not disputed and the legal issue was fully argued upon the hearing of the order to show cause and thereafter briefed, a return to the writ and a further hearing are unnecessary."

I have drafted an order to submit to your Honor along those lines and the only point that has to be noted is the bond. This is an appealable order.

The bond in the Toth case was $1,000 and I suggest that that would be appropriate here.

The COURT: Mr. Burka, do you have any views about the form of this order?

Mr. BURKA: Your Honor, I have no objection to the order as such. I believe that under your Honor's ruling the Government should agree thereto.

However, in the matter of bond, this is, in civilian life, a
189 question of first degree murder, premeditated murder. We feel that a bond in the sum of $1,000 is perhaps too small. We would suggest it be higher in the discretion of the Court.

The COURT: What do you say is a reasonable bond, Mr. Burka?

Mr. BURKA: May I confer with my colleagues?

Mr. WIENER: In the——

The COURT: I will hear you in just a minute.

Mr. BURKA: We would recommend $5,000, your Honor.

Mr. WIENER: I mentioned $1,000 because that is what it was in the Toth case and, after all, this isn't bail. This is a bond. This is really an appeal bond.

Mr. BURKA: I agree, your Honor. If that was the bond set in the Toth case I agree with that.

The COURT: I think $1,000 bond is adequate in this case. I don't know the economic circumstances of the petitioner. I did observe in reading the transcript of the proceedings before the Military Court of Appeals last night that one of the factors of causation of the petitioner's alleged mental or emotional disturbance was the fact that she was about to inherit some type of estate, and there was a dispute as to whether it would be saved for the education of the children or spent in a tour of the continent with her husband.

190 I think a $1,000 bond is adequate in this case.

Mr. BURKA: The estate, I understand and although it has

no bearing on the bond, and I agree that a $1,000 bond would be sufficient; it is my understanding that it was around $40,000.

Mr. WIENER: That is my information.

(Thereupon the instant hearing was concluded.)

191 [File endorsement omitted]

In the United States District Court for the District of Columbia

Habeas Corpus No. 87-55

UNITED STATES OF AMERICA on the relation of CLARICE B. COVERT

v.

CURTIS REID, Superintendent of the District of Columbia Jail

JUDGMENT OF RELEASE AND DISCHARGE—November 22, 1955

Upon consideration of the Petition for a Writ of Habeas Corpus, the Order directing Respondent to Show Cause, and Respondent's Return and Answer Thereto, and the briefs of both parties and argument of counsel in open court; it is by the Court, this 22nd day of November 1955,

ORDERED, That the writ of habeas corpus issue as prayed for;

FURTHER ORDERED, That, inasmuch as the relevant facts are not disputed and the legal issue was fully argued upon the hearing on the Order directing Respondent to Show Cause, a return to the writ and a further hearing are unnecessary;

FURTHER ORDERED, That the relator, CLARICE B. COVERT, be, and she hereby is, released from the custody of the respondent; *Provided, however*, that the said CLARICE B. COVERT post a bond in the sum of One Thousand Dollars ($1,000.00) cash or bond, with the surety approved by the Clerk of this Court, conditioned upon her appearance before this Court at the conclusion of the appeal which may be taken by the respondent herein.

EDWARD A. TAMM,
United States District Judge.

Seen:

ALFRED BURKA,
Attorney for the Respondent.

192 [File endorsement omitted]

In the United States District Court for the District of Columbia

[Title omitted]

NOTICE OF APPEAL—Filed December 22, 1955

(a)

Comes now the Respondent by his attorney, the United States Attorney, and hereby notes this direct appeal to The Supreme Court of the United States; the judgment appealed from is the judgment of this Honorable Court, dated the 22nd day of November, 1955, ordering that the Writ of Habeas Corpus issue as prayed for and, further ordering that the relator, Clarice B. Covert, be and she hereby is released from custody of the Respondent; the said Order was dated the 22nd day of November, 1955, and was entered by this Court on that date; the statute under which this direct appeal is taken is Title 28, U. S. C. Section 1252; the case involved is a Habeas Corpus case wherein the petitioner had been convicted by Military Court convened in England of the offense of murder and had received a life sentence; temporarily petitioner was in the custody of Respondent as Superintendent of the D. C. Jail pending retrial of the offense with which she is charged by the Military authorities at Bolling Field, D. C.

(b)

Respondent designates the following portions of the record to be certified by the Clerk of the United States District Court for the District of Columbia to The Supreme Court of the United States:

193 1. Petition for Habeas Corpus.

2. An Order to show cause issued thereupon.

3. Respondent's return and answer, including exhibits filed therewith.

4. Reporter's transcript of the Opinion of the Court.

5. Judgment of release and discharge signed November 22, 1955.

6. This Notice of Appeal.

(c)

The question presented is whether Article 2 (11) of the Uniform Code of Military Justice, also cited as Section 552 (11) of Title 50 of the U. S. Code which authorizes trial by court-martial of

civilians serving with or accompanying the Armed Forces overseas is unconstitutional.

LEO A. ROVER,
United States Attorney.
OLIVER GASCH,
Principal Asst. to U. S. Attorney.
ALFRED BURKA,
Asst. United States Attorney.

CERTIFICATION

This is to certify that a copy of the foregoing Notice of Appeal was served on counsel for the Respondent, Frederick Bernays Wiener, Esquire, 1025 Conn. Ave., N. W., Washington, D. C., this 22nd day of December, 1955, by United States Mail.

OLIVER GASCH,
Principal Asst. to U. S. Attorney.

194 [File endorsement omitted]

In the United States District Court for the District of Columbia.

[Title omitted]

STIPULATION FOR ADDITION TO RECORD—Filed January 10, 1956

It is hereby stipulated, by and between the parties to the above-entitled cause, that the exhibit introduced on behalf of the respondent herein at the hearing of this cause on November 22, 1955, being the copy of the original record of trial of the relator by a general court-martial of the United States Air Force, is to be regarded as supplemented by the attached copies of the three post-trial affidavits, all of which were considered by the Board of Review of the United States Air Force, as is more particularly set forth in the opinions rendered in said Board, which said opinions are Exhibit C to the respondent's return in this case; all of which were likewise considered by the United States Court of Military Appeals, as is more particularly set forth in the opinions rendered in said Court, which said opinions are Exhibit F to the respondent's return in this case; and which affidavits are more particularly described as follows:

1. Affidavit of Captain Nathan R. Adelsohn, USAF, verified June 1, 1953.
2. Affidavit of Captain James H. Graves, USAF, verified June 10, 1953.

195 3. Affidavit of Lieutenant Colonel Richard L. Martin, USAF, verified June 10, 1953.

It is further stipulated, by and between the parties to the above-entitled cause, that the attached three affidavits shall have the same force and effect as though they had been included within and as a part of said record of trial by general court-martial at the time said record of trial was offered as an exhibit in this cause.

Dated this 9th day of January, 1956.

FREDERICK BERNAYS WIENER,
1025 Connecticut Avenue, N. W.,
Washington 6, D. C.,
Attorney for the Relator.

LEO A. ROVER,
United States Attorney.
OLIVER GASCH,
Principal Asst. to U. S. Attorney.
ALFRED BURKA,
Asst. U. S. Attorney,
Attorneys for the Respondent.

196 AFFIDAVIT

To Whom It May Concern:

I, Captain Nathan R. Adelsohn, 5th General Hospital, Burderop Park, England, having been requested by the Defense Counsel in the General Court-Martial case of the United States v. Mrs. Clarice B. Covert to present the substance of the tests which I gave Mrs. Covert and from which I reached a diagnosis as to her mental responsibility on the night of 10 March 1953 and having been duly sworn do hereby state under oath:

That I am the same Captain Adelsohn who testified at the General Court-Martial case which convicted Mrs. Covert of premeditated murder.

I first tested Mrs. Clarice Covert on 12 March. The tests I used were:

1. *Wechsler-Bellevue Scale.* This test is not only a measure of intelligence, but is also a valuable clinical diagnostic tool. From a study of a person's responses on this test it is possible to draw certain inferences about a patient and about her mental functioning. It also gives information as to a patient's mental functioning in comparison with the mental functioning of others, whether they be normal, psychotic, or other. It is also possible to draw inferences regarding her present mental functioning in comparison with past level of functioning. To explain this briefly, it has been found that whenever there is a falling off in mental functioning—

as in mental disease—this falling off is not uniformly even, but effects certain areas more severely than other areas.

This test consists of eleven Sub-tests, comprising roughly 180 separate items. Similarly, the other tests to be discussed below call for large numbers of responses; for example the *Minnesota Multiphasic Personality Inventory* has 550 items. An analysis of a patient's performance in each of the Sub-tests and a further analysis of her performance on each of the items makes it possible to comment upon her mental level at the time of testing in comparison with her functioning at a previous period.

The findings of this test revealed Mrs. Covert was well informed. Generally good judgment was also evidenced. An analysis of this judgment, however, showed that it was good in connection with matters of no personal concern to her, but that the judgment was poor in matters involving personal values. She shows perceptual distortion, i.e., difficulty in seeing items in pictures placed before her, and at times assumed that things were there, which objectively were *not* there. This is evidenced most clearly on the Picture Completion and Picture Arrangement Sub-tests. It should be noted that the perceptual distortion is not characteristic of normal performance, i.e., mentally normal people do not distort things they see to a significant degree. Neurotics often do distort things they see, but usually to only a small degree. Only where there is a major upheaval as in organic brain damage or in psychosis is there a severe perceptual distortion. The distortion found here was severe and clearly of an order which is regularly classed as psychotic.

Evidence is also found of paranoid ideas which will be discussed more fully in connection with another test below. Severe difficulty in concentration was also evidenced, and marked impairment of her analytic-synthetic thought processes. The latter is evidenced most clearly by the almost complete failure on the Block Designs Sub-test, beyond a degree found with most severe neurotics. There is also marked impairment of ability to grasp relationships, or deduce the common element between related things. This attests also to an impairment of ability to profit to a normal degree from past experience.

197 Also found in this test was strong evidence of depression. On tasks which she can master quickly, without great effort, she is normally successful, however, tasks requiring immediate directed effort and perseverance, she fails.

An analysis of the pattern of Sub-tests scores also was consistent with that of a schizophrenic picture. This diagnosis is consistent with data presented by the author of this test and by consensus of findings by psychologists in the twenty years during which this standardized test has been used.

2. *Wechsler-Bellevue Scale Re-test.* On 23 April 1953 at the request of Captain Heisler the undersigned re-tested Mrs. Covert using Form II of the Wechsler-Bellevue Scale, which is an alternate form of the test described above in Section I. The findings were substantially the same. In only two of the eleven Sub-tests was there appreciable change, i.e., in areas in which she did well on the first test, she also did well upon re-test, and visa-versa.

3. *Bender-Gestalt Test*—suggests presence of psychosis, probably depressive.

4. *H-T-P and Machover Tests*—findings indeterminate as to neurosis or psychosis, though severity of disturbance is strongly suggested, and this in turn suggests psychotic rather than neurotic diagnosis.

5. *Rorschach Test.* Psychosis is most probable explanation for her performance here, though it is borderline, with many life-long neurotic features in evidence. Predominant, however, were evidences of "freezing" of her emotional life, and a basic seclusiveness and need to withdraw from people. These tendencies are narcisstic in character and suggest psychotic or near-psychotic level of adjustment, rather than neurosis. Very important also are strong evidences of paranoid ideas. These, in combination with the above findings, suggest paranoid schizophrenic diagnosis. Much insight into the structure of her personality which was obtained from this test must be omitted here, but is reflected in the final conclusions of the undersigned.

6. *Thematic Apperception Test*—gave considerable information regarding her conflicts in living. Clear evidence is obtained of the fluidity of her transference reactions, e.g., her great readiness to see husband as father, her children as herself when younger, etc. Diagnostic differentation is not facilitated directly by use of this test, but was valuable in arriving at a rounded understanding of the patient's personality.

7. *Sentence Completion Tests*—as in the test immediately above, these tests were not of value for diagnostic differentiation, but only for understanding the patient's unconscious motivations.

8. *Cornell Index.* The Index of 54 suggests major order of disturbance.

9. *Minnesota Multiphasic Personality Inventory.* The pattern secured by her responses on this test, when plotted graphically, shows two outstanding trends: Depression and Schizophrenia. While this examiner places limited confidence in this test because of possibility of falsification on this questionnaire-type test, the fact remains that the "Lie" score, is low. This score, which is part of the test, evaluates a patient's tendency to falsify. The low "Lie" score suggests an honest approach. This has been confirmed by no less than 40 hours work with this patient to date.

On this test the patient is asked to respond to each of 550 statements as being *True, False or Cannot Say*, as applied to herself.

198 I shall set down here several of the noteworthy responses, as follows:

Item H-4. "I believe I am being followed." (True)

Item H-2. "I have often felt that strangers were looking at me critically." (True)

Item H-3. "I am sure I am being talked about." (True)

Item H-1. "I am bothered by people outside, on street cars, in stores, etc., watching me." (True)

Item G-52. "I have no enemies who really wish to harm me." (False)

Item H-8. "At one or more times in my life I felt that someone was making me do things by hypnotizing me." (True)

Item H-51. "Whenever possible I avoid being in a crowd. (True)

There are numerous other evidences of paranoid fears. These are but a few: Some such feelings are experienced by normals, more by neurotics, but here there are so many as to strongly suggest psychosis. There are also evidences of dissociative tendencies, such as:

Item A-20. "I have had attacks in which I could not control my movements or speech but in which I knew what was going on around me." (True)

Item A-21. "I have had blank spells in which my activities were interrupted and I did not know what was going on around me." (True)

Item H-12. "I have had very peculiar and strange experiences." (True)

Item G-50. "Some people are so bossy that I feel like doing the opposite of what they request; even though I know they are right." (True)

This item suggests dissociation or unawareness of hostility, i.e., hostility comes out unconsciously; rarely, if ever, consciously. This suggests the unconscious motivation and nature of the fatal act—or to say it another way—there was probably an unconsciousness of just what she was doing. The awareness of all five members of the Neuropsychiatric Staff of the cloudedness of her consciousness is

what made for the unanimity on this point; viz., that the act was not premeditated.

10. *Goldstein Scheerer Cube Test.* This test was administered 23 April 1953, after the re-test with the Wechsler-Bellevue Scale Form II. The examiner originally did not plan to use this test, but it was given for this reason: the patient's performance on the Cube (or Block Designs) Sub-test of the Wechsler-Bellevue had been so extremely poor as to suggest major impairment of thought, such as could not possibly be explained as neurotic, even on the most severe order—and I desired to study this area more intensively. If there would be failure here, a neurotic diagnosis would have to be rejected. If she succeeded, one would know but little more than was known before. There was failure. One might say this was an "either—or" test. The result of the test was crucial and unequivocal. It established the absence of an essential component for normal thought processes required in everyday living. (To the best of my knowledge, the result of this test was discussed briefly with only one member of the Sanity Board—Captain Graves).

199 The patient unquestionably did not malinger. (The possibility of malingering had been considered but in the final analysis was rejected.) The patient went through an emotional agony in trying to reproduce these elementary designs, but she failed over-and-again. When designs with guide lines were used she succeeded. When the designs without guide lines were used again, she continually failed.

The day before preparing this affidavit, the undersigned obtained for the first time the patient's hospital chart and found under "Nursing Notes", dated 24 April 0730 hours, the following entry: "Complaining severe headache, tearful, agitated. Is concerned over her psychological tests. 'I couldn't put those blocks together! A two-yr. old child can do that! What's the matter with me? Is my brain dead? - - -!"

Based on the various tests given Mrs. Covert, I have reached a diagnosis as to her mental condition on the night of 10 March 1953 which is: psychosis, specifically, paranoid schizophrenia.

In my clinical interviews with this patient, preceding and following the testing, I was impressed with the psychotic depressive features present, and I can understand how clinical interviews could result in the diagnosis of psychotic depression. It appears to me, however, that the diagnosis of paranoid schizophrenia takes into consideration more adequately the narcissistic, seclusive, schizoid, and paranoid features present, which sometimes are more pronounced in testing than in interview. In either case, psychosis, meaning—I presume—legal irresponsibility, seems to me to have been clearly present. I disagree with a finding of neurotic depression, as that is counterindicated by the bulk of the data I have

gained from the patient's responses, and I am of the opinion that this data was not effectively or intensively examined by the members of the Sanity Board.

Witness my signature this the 17th day of June 1953.

(S.) NATHAN R. ADELSOHN.

Sworn to and subscribed before me, the undersigned authority, this the 17th day of June 1953.

(S.) GEORGE J. SCHWEIZER, JR.,
Major, USAF,
Judge Advocate.

200 AFFIDAVIT

To whom it may concern:

I, Captain James H. Graves, 5th Hospital Group, Burderop Park, England, have been duly sworn and do hereby state under oath; that I am the same Doctor Graves who was a member of the Sanity Board which inquired into the mental condition of Mrs. Clarice B. Covert and who testified at the general Court-Martial case which convicted Mrs. Clarice B. Covert of premeditated murder; that I am making this Affidavit for whatever value it may be to the reviewing authority without solicitation on the part of the defense counsel and entirely because from my knowledge of the case, the findings of the general court martial are in error. I feel that in some essential sense the meaning of the medical testimony as given by myself (and presumably by other members of the Sanity Board) was not sufficiently clear to the members of the court to enable them to reach a verdict consonant with the medical facts in the case.

I should like to make clear to the reviewing authority, that which I apparently did not make clear to the members of the court, that the members of the Sanity Board were, of necessity, governed in making their decisions by the provisions of Air Force Manual 160-42. It has been difficult for me, and I assume for other members of the Board, to clearly express our feelings about this case within the framework of this Air Force Manual. According to the provisions of this Manual, I, as a Psychiatrist, had no choice but to find this individual sane. In the field of psychiatry, however, more than in any other field of human knowledge, it is impossible to express the complexities of human behavior in terms of black and white. As a psychiatrist it is my training and my professional function to view all human behavior in its proper shade of grey. I clearly understand that it is the purpose and duty of the members of the court to consider my evaluation of the "shade of grey" terms. However, it does not follow that because the patient was not insane at the time of the commission of the offence that she must therefore necessarily have been guilty of *an* conscious *premeditated* crime.

There is, I must state again, no psychiatric evidence of any sort which would lead me to believe that there was sufficient degree of conscious participation in the planning and execution of this act to refer to it as a premeditated crime. To consider it as such would in my opinion, from considerable knowledge of the past history and personality structure of this person, be a clear cut miscarriage of justice.

Witness my signature this 10th day of June 1953.

(S.) James H. Graves,
(T.) James H. Graves,
Captain, USAF (MC).

Sworn and subscribed to before me, the undersigned authority, this the 10th day of June 1953.

(S.) Ross A. Ward,
(T.) Ross A. Ward,
Major, USAF (MSC),
Adjutant, 5th Hosp. Gp.,
APO 232.

201 AFFIDAVIT

To whom it may concern:

I, Lieutenant Colonel Richard L. Martin, 5th General Hospital, Burderop Park, England, having been duly sworn do hereby state under oath:

That I am the same Doctor Martin who was President of the Sanity Board which inquired into the mental condition of Mrs. Clarice B. Covert and who testified in the General Court-Martial case which convicted Mrs. Clarice B. Covert of premeditated murder; that I am making this affidavit, for whatever value it may be to the reviewing authority, without solicitation on the part of the defense counsel and entirely because from my knowledge of the case, and I believe few people know more about the case than I do, the findings of the General Court-Martial are completely wrong. I can only conclude that the court's findings was either reached without consideration of the medical testimony or that the medical testimony presented an inadequate picture. Since there may have been legal technicalities which prevented my testifying in detail as to my understanding of the case, I desire at this time to set forth my views in more detail.

I believe that Air Force Manual 160-42 is far too limited in its scope to include all necessary cases in psychiatry and hindered the Sanity Board in reaching a finding that adequately expressed the true condition of Mrs. Covert on the night of 10 March 1953. Her case is one which, in my opinion, most psychiatrists would agree

would not fall within the scope of this Manual. The Manual makes it impossible to explain Mrs. Covert's lack of ability to adhere to the right in regard to the particular offense charged as an irresistable impulse because of one limitation: we could not say that she would have carried out the act if a civilian authority had been there. If that strong limitation had not been present, her condition could be explained as an irresistable impulse. Within the limitations of the Manual, I feel that her condition could better be explained as I testified; as being a dissociative reaction. As explained in the Manual, an acute case of such reaction results in a personality (ego) disorganization that permits the anxiety to overwhelm and momentarily govern the total individual and that this occurs with little or no participation on the part of the conscious personality. This is what I believe happened in Mrs. Covert's case. In such cases as these, as is well known, a person may be brought out of an acute state of dissociative reaction by shock as simple as being slapped in the face. In this connection, I believe that the reaction through which Mrs. Covert went on the night of 10 March was such that the appearance of a civil authority at her side would have been equivalent to the slap in the face and that she probably would not have carried out the alleged act. The same probably would have been true if her children would have come into the room. But none of these things happened and she remained in a dissociated state until she had taken the sedatives and fallen to sleep. It should further be explained that a dissociative reaction is not necessarily a momentarily thing and it may last for some time as long as no outside stimulant shocks the individual back to normal. The fact that she took the time to go down stairs to get the ax, therefore, does not rule out this diagnosis and does not mean that the act was consciously controlled.

202-204 The fact that the defendant has some memory for what actually happened is not an indication that the act was consciously carried out. Many very severe psychotics who have been psychotic for some time and recover may have complete memory for everything that happened and all of their behaviors during the psychotic period. In this connection, many persons with an irresistable impulse as defined in Air Force Manual 160-42 may have memory for the act but are still unable to avoid carrying out the act.

All of my feelings about this case can be summed up in the statement that I believe Mrs. Covert was what I would call "temporarily insane" on the night of 10 March 1953. Since this is a legal and not a psychiatric term, I may have the wrong understanding. The term "insanity", to me, means that the individual is not responsible for his or her behavior. My understanding of "temporary insanity" does not make it synonymous with the term "psychosis".

There are a number of mental or emotional reactions not included in Air Force Manual 160-42 which I could classify as a form of insanity from my understanding of the term that would more adequately describe the condition of Mrs. Covert on the night of 10 March without saying that she was psychotic.

I would like to add that from my knowledge of Mrs. Covert and the information gained by Doctor Heisler in his examinations of her that I am completely convinced that what she has related to us has been the entire truth. I am also of the opinion that confinement for any extensive period of time would do more harm than good in view of what I consider her true mental condition to have been on the night of 10 March and her present mental state.

Witness my signature this the 10th day of June 1953.

(S.) RICHARD L. MARTIN,
(T.) RICHARD L. MARTIN,
Lt. Col. USAF.

Sworn and subscribed to before me, the undersigned authority, this the 10th day of June 1953.

(S.) ROSS A. WARD,
(T.) ROSS A. WARD,
Major, USAF (MSC),
19451A,
Adjutant, 5th Hosp. Gp., APO 232,

205 Clerk's Certificate to foregoing transcript omitted in printing

206 Supreme Court of the United States

[Title omitted]

ORDER POSTPONING CONSIDERATION OF JURISDICTION—March 12, 1956

APPEAL from the United States District Court for the District of Columbia.

The statement of jurisdiction and the motion to dismiss or affirm in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court and of the motion to dismiss or affirm is postponed to the hearing of the case on the merits. The case is transferred to the summary calendar.

March 12, 1956.

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